# FROM ONE HORSE RACE TO COMPETITION: THE TELECOMMUNICATIONS MARATHON WILL THE WINNER(S) STEP UP TO THE PODIUM PLEASE?

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## I. INTRODUCTION

In 490BC, when Pheidippides ran twenty six miles to announce the Greek victory at Marathon, the idea of "competition" and a "level playing field" may have been on the minds of those who dreamed of an Olympic spirit, but it was certainly not an issue in communications where another forty years would have to pass before carrier pigeons would spread such news.

In the Australian telecommunications industry today, however, concepts such as "level playing field", "competition", "access" and "open market" are the basic starting blocks for the new rules under which the telecommunications race is run.[1] In order to understand those new race rules, it is helpful to recall some major milestones in the process of reform.

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The views expressed in this article are personal and do not necessarily reflect the views of the author's firm or its clients.

1 This is also the case in a number of other countries, including New Zealand, Japan, Singapore, the United States of America and the United Kingdom.

## II. THE PROCESS OF REFORM OF THE TELECOMMUNICATIONS INDUSTRY

Until the establishment of the Australian Telecommunications Commission (later Corporation)[2] ("Telecom") in 1975,[3] the establishment and operation of telecommunications services was the concern of the colonial Postmasters-General and, after Federation, of the Commonwealth Postmaster-General's Department.[4]

In 1946, the Overseas Telecommunications Commission ("OTC") was established[5] with a monopoly over international communications carriage.[6] In 1981, Aussat Pty Limited ("Aussat") was incorporated for the purposes of owning and managing Australia's new national satellite system.[7]

### A. The Davidson Committee Review

In the same year that Aussat was incorporated, the Prime Minister declared that the Telecom monopoly could "no longer be considered sacrosanct"[8] and the Committee of Inquiry into Telecommunications Services in Australia (the "Davidson Committee") was established. Its specific charter was to consider, inter alia, the possibility of wider private sector involvement in telecommunications, having regard to the "significant technological advances" occurring both in Australia and internationally.[9]

The Davidson Committee Report strongly favoured greater private sector involvement and recommended an end to Telecom's policy of cross-subsidising unprofitable services introduced in response to Government priorities.[10] The Report also proposed that there be a single Act regulating all telecommunications systems, including broadcasting transmitters and cable television systems.[11] A

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2 *Australian Telecommunications Corporation Act* 1989 (Cth).

3 At that time, the postal and telecommunications functions of the Postmaster-General's Department were split and transferred to two new statutory corporations - Telecom and Australia Post (the former being established by the *Telecommunications Act* 1975 (Cth)).

4 Butterworths, *Communications Law and Policy in Australia*, at [1050] and [2005].

5 OTC was established under the *Overseas Telecommunications Act* 1946 (Cth).

6 Until the opening of a cable service to Europe in 1872, Australia's international communications were conducted via sea mail. By World War II, all international electronic communications were conducted through Cable & Wireless Ltd, a private monopoly which provided services between Britain and the rest of the Empire. AWA Limited conducted the radio telegraph services which connected with the international network. Certain problems in the system became apparent as a result of the war and, by 1945, the Commonwealth nations had agreed that a group of interlocking government-owned telecommunications authorities would replace private ownership of the cable and wireless services. The Australian authority was OTC: note 4 *supra* at [2030].

7 Under the *Satellite Communications Act* 1984 (Cth), the shareholdings in Aussat were held by Telecom (25 per cent) and in trust for the Federal Government (75 per cent). Under that Act, Aussat was prevented from providing domestic public switched telephone or data services, and the extent to which satellite could be used for private telecommunications services was also restricted: note 4 *supra* at [1060] and [2135].

8 Australia, House of Representatives 1981, Debates, vol HR 122, p 1831.

9 (1981) 6 *Commonwealth Record* 1197-8 cited in note 4 *supra* at [2120].

10 *Report of the Committee of Inquiry into Telecommunications Services in Australia* (the "Davidson Committee Report"), AGPS (October 1982) pp 47 and 138-55.

11 Calls for a single "Communications Act" continue today, given impetus by the covergence of the telecommunications, broadcasting, computer and information industries.

simplified Broadcasting Act would then regulate the television programs supplied under a system licence granted under the new single Act.

The Davidson Committee's Report was never implemented.

## B. The Evans Review

The reforms proposed by the Davidson Committee were again addressed in May 1988 by the Hawke Government. Senator Gareth Evans, the then Minister for Transport and Communications, headed a review of Australia's telecommunications structure and lent his name to the product of that review, entitled *Australian Telecommunications Services: A New Framework* (the "Evans Statement").

The Evans Statement was implemented almost in its entirety in the *Telecommunications Act* 1989 (Cth). Essentially, the Evans Statement called for:[12]

1. continuing authority for the then existing carriers (Telecom, OTC and Aussat) to be the sole providers of basic telecommunications network facilities and services, subject to greater commercial and external regulatory discipline, primarily:
   (a) revised government controls over carriers, placing more emphasis on government setting of goals and performance targets rather than day to day supervision; and
   (b) close control by a newly-created telecommunications authority, the Australian Telecommunications Authority ("Austel");[13]
2. full scope for competition in the provision and operation of value-added services, such as information and data services;
3. increased scope for competition in the provision of network terminal equipment for connection within customers' premises and, with some limited exceptions, new scope for competition in the sale, installation and maintenance of switchboards, telephone handsets, wiring and other premises equipment; and
4. regulatory arrangements independent of the carriers and directed towards ensuring maintenance of minimum necessary standards; fair and efficient competition beyond the network boundaries; and improved carrier efficiency and accountability. The main regulatory body responsible for these arrangements would be Austel. The other regulatory body, the Trade Practices Commission, would apply trade practices law to the competitive areas of telecommunications as to other markets in the Australian economy.

The Evans Statement, and its implementation, was the subject of much controversy. However, new arrangements to govern the structure of all government business enterprises in the communications area (including Telecom,

12 Evans Statement, pp 188-9 cited in note 4 *supra* at [2185].

13 Austel was loosely modelled on OFTEL, the United Kingdom telecommunications regulatory body.

OTC and Aussat), propounded by Senator Evans in a contemporaneous report,[14] were less controversial.

### C. The Beazley Statement

By December 1989, the issue of the ownership and structural relationships of the three government-owned telecommunications carriers (Telecom, OTC and Aussat) had assumed an urgent importance, primarily because of the mounting debt burden on the Federal Government from Aussat. At that time, the Government announced a departmental review, entitled the Review of Structural Arrangements ("ROSA"). However, the 1989 legislative implementation of the Evans Statement, and the issue of network competition generally, soon became the focus of ROSA.

In November 1990, the then Prime Minister, RJ Hawke, announced the major changes resulting from ROSA. Concurrently, Mr Kim Beazley, the then Minister for Transport and Communications, released a statement entitled "Microeconomic Reform: Progress Telecommunications" (the "Beazley Statement").

The Beazley Statement detailed the mechanisms by which the Government would introduce network competition into the Australian telecommunications industry. Principally, this was to be achieved through the creation of a duopoly constituted by the merger of Telecom and OTC into the Australian and Overseas Telecommunications Corporation ("AOTC") (now Telstra Corporation Limited ("Telstra")) and the privatisation of Aussat (now Optus Network Pty Limited ("Optus")) in December 1991. However, it was intended that the duopoly would simply be a means for introducing more substantial network competition. Accordingly, a sunset clause was included, under which the general carrier duopoly would end on 30 June 1997.[15]

The major components of the Beazley Statement were implemented in July 1991, by a legislative package of seven telecommunications Acts.[16] The most important Act of the legislative package for present purposes, is the *Telecommunications Act* 1991 (Cth) (the "Act"). In addition, there are numerous Ministerial directions, determinations and declarations, as well as Austel documents, which establish the regulatory regime.

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14 *Reshaping the Transport and Communications Government Business Enterprises*, AGPS (May 1988) (the "GBE Statement"). The GBE Statement applied to telecommunications services, principles which had already been spelled out in an earlier policy document relating to all Commonwealth enterprises: *Policy Guidelines for Commonwealth Statutory Authorities and Government Business Enterprises*, AGPS (October 1987). The following pieces of legislation, inter alia, were introduced as a result of the GBE Statement: *Telecommunications Corporation Act* 1989 (Cth), *OTC (Conversion into Public Company) Act* 1988 (Cth) and *Satellite Communications Amendment Act* 1988 (Cth): note 4 *supra* at [2195].

15 Beazley Statement, p 14.

16 *Telecommunications Act* 1991 (Cth), *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth), *Telecommunications (Carrier Licence Fees) Act* 1991 (Cth), *Telecommunications (Numbering Fees) Act* 1991 (Cth), *Telecommunications (Universal Service Levy) Act* 1991 (Cth), *Telecommunications (Applications Fees) Act* 1991 (Cth) and *Telecommunications (Transitional Provisions and Consequential Amendments) Act* 1991 (Cth).

## III. GENERAL OVERVIEW OF THE SCHEME OF THE *TELECOMMUNICATIONS ACT* 1991 (CTH)[17]

At present, there are two general carriers (Telstra and Optus) and three mobile carriers (Telstra, Optus and Vodafone Pty Limited ("Vodafone")) licensed under the Act. The present general carrier duopoly is scheduled to conclude on 30 June 1997.[18]

The substantive and definitional provisions of the Act, which set the parameters of the carriers' exclusive rights, are complex.[19] Essentially, the general carriers have the exclusive right to install and maintain what are known as "reserved line links"[20] - essentially, cables between two separate properties.[21] The general carriers also have certain exclusive rights in relation to the supply of satellite services[22] and the provision of public payphones.[23] The mobile carriers have certain exclusive rights in relation to the supply of public mobile telecommunications services.[24]

Subject to the general pricing and tariffing rules discussed below, the carriers are to be free to exploit the economies of scale and scope available to them as a result of their control of telecommunications facilities.[25] Apart from the public payphones reservation, the supply, installation, maintenance and operation of

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17 The general overview in Part III of this article, as well as the discussion of network competition reforms in Part IV, are intended merely to introduce the general reader to the Australian telecommunications regulatory environment in order to form a basis for comprehension of the issues discussed. The scheme which regulates telecommunications in Australia is extremely complex and, accordingly, a full analysis of the relevant provisions is well beyond the scope of this article.

18 The Act makes no express reference to a review in 1997. Instead, the basis for the review is contained in decision D82 of the Beazley Statement (that the new carrier arrangements will be subject to a sunset clause to come into effect on 30 June 1997) and clause 2 of the Deed of Agreement between the Commonwealth of Australia and AUSSAT Pty Ltd under s 70 of the *Telecommunications Act* relating to General Carrier Licences and Conditions. It should be noted that the present system of 3 licensed mobile carriers for public mobile telecommunications services is scheduled to conclude on 30 June 1995 (refer clause 2 of the Deed of Agreement between the Commonwealth of Australia and Mobilcom Pty Ltd under s 70 of the *Telecommunications Act* relating to Mobile Carrier Licences and Conditions. Preliminary work on the post 30 June 1997 regime has already begun. The Department of Communications and Arts' Planning Evaluation and Audit Committee has established a steering committee comprising officials from the Department's Telecommunication Policy Division, the BTCE and the Department's Aviation Division (which has experience in evaluating reforms): G Lynch, "Govt begins assessment of competition reforms" (1993) 5 (39) *Exchange* 4.

19 Section 5 and Part 6 of the Act.

20 Section 90 of the Act.

21 Sections 5, 22 and 24 of the Act. The Act does create an exception for broadcasters (s 99 of the Act), so that broadcasters can install and maintain their own private cable networks. However, these private networks can only be used for limited purposes and by certain persons (s 102 of the Act). The Act also creates an exception for Austel to authorise any person to install, maintain, use or dispose of reserved line links (s 108(a) of the Act).

22 Section 92 of the Act. The Act creates an exception for Austel to authorise any person to supply, by the use of specified satellite-based facilities, specified telecommunications services (s 108(b) of the Act).

23 Section 93 of the Act.

24 Section 94 of the Act.

25 Section 89(c) of the Act.

equipment, lines and facilities beyond the boundaries of the carriers' networks are intended to be open to competition.[26]

The telecommunications industry is of significant, and increasing, economic and social importance, not only of itself, but also in terms of its impact upon the performance of other industries.[27] The changes wrought by the Act are, arguably, the most significant and far-reaching reforms to have occurred in that industry. The most substantial of these reforms - the introduction of network competition - is the focus of this article.[28]

## IV. THE NETWORK COMPETITION REFORMS

The introduction of competition into the Australian telecommunications industry was not brought about by full scale deregulation of the industry. Rather, as was said at the time:

> ...the government has taken the view that the creation of one strong competitor is the best way of achieving genuine and sustainable network competition quickly in a market the size of Australia's; the aim is to ensure that by 1997 there is a significant, recognised network competitor to Telecom-OTC.[29]

Thus, one of the principal objectives of the Act is the introduction of sustainable network competition. A related, but subordinate, objective is the promotion of competition in the supply of telecommunications services:

> While the main long term goal of the new regulatory framework lies in fostering network competition, the government has also moved to foster competition from other service providers, in a manner consistent with that primary goal.[30]

The concept of "competition" is liberally employed under the Act, which contains numerous references to "competition"[31] and to related concepts such as "efficiency",[32] "participating effectively in markets"[33] and "fair and efficient market conduct".[34]

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26 Section 89(d) of the Act.

27 Telecommunications is one of the largest industries in Australia, consuming a substantial amount of national capital and labour resources. Detailed statistics relating to this industry appear in Austel, *The Importance of Telecommunications in Australia's Economic Development and the Likely Effect of Telecommunications Reform*, Occasional Paper Economics 1, AGPS (September 1992) pp 7-20.

28 Although there is presently much comment and discussion on the convergence of the telecommunications, broadcasting, computing and information industries, this article, primarily because of spatial limitations and the complexity of the issues, will discuss competition reforms in the telecommunications industry in isolation. It is not intended thereby, to suggest that domestic and international reforms in the other converging industries will not impact on competition in telecommunications.

29 Second Reading Speech of the Minister: Australia, House of Representatives 1991, Debates, No HR 8, p 3096.

30 *Ibid*, p 3098.

31 Sections 3(i), 36(ii), 37, 40, 55(d)(i), 89(d), 136(i), 173(c), 173(d), 173(e), 203(c) and 399 of the Act.

32 Sections 3(a)(i), 3(b), 3(i), 36(i), 136(2)(d), 203(1)(a)(i), 203(1)(c), 287(1)(b), 399(2)(a) and 399(2)(d) of the Act.

33 Section 3(g) of the Act.

34 Sections 3(i), 36(1) and 203(1)(c) of the Act.

The Act regulates both the relationship between telecommunications carriers and their respective relationships with other service providers and, in some instances, their respective relationships with customers. Competition is promoted and regulated primarily through:

1. the interconnection and access arrangements between carriers;[35]
2. the imposition of price caps on Telstra;[36]
3. the principles of tariffing and pricing of telecommunications services by carriers and certain prohibitions on discrimination;[37]
4. the powers granted to Austel to give unbundling directions;[38]
5. the location of the network termination point;[39] and
6. the resale of telecommunications capacity (both domestically and internationally).[40]

Competition in the Australian telecommunications industry is also affected by, inter alia:

- the principles of accounting separation;[41]
- the scheme[42] for the assessment, collection and distribution of the universal service levy in respect of the universal service obligation;[43] and
- certain restrictions in relation to the market for mobile communications.[44]

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35 Part 8 of the Act and Telecommunications (Interconnection and Related Charging Principles) Determination (No 1) of 1991.

36 AOTC Carrier Charges Price Control Determination 1992 (made under ss 20, 21 and 23 of the *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth).

37 Part 9 of the Act.

38 Part 9, Division 3 of the Act.

39 Sections 6, 7 and 11 of the Act.

40 Part 10 of the Act.

41 Part 5, Division 5 of the Act. The principles of accounting separation of the carriers' business activities are designed to assist in identifying cross-subsidisation of non-competitive areas of business from competitive areas. Austel has developed a chart of accounts and cost allocation manual ("COA/CAM") for the purposes of accounting separation.

42 Part 13 of the Act.

43 Briefly, the universal service obligation is the obligation to ensure that the standard telephone service (as defined in s 5 of the Act) and payphones are reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; to supply the standard telephone service to people in Australia; and to supply, install and maintain payphones in Australia: s 288 of the Act. Although, strictly, the universal service obligation is imposed only on a carrier that is declared by the Government to be a universal service carrier (s 290(1)(a) of the Act), other carriers declared to be participating carriers (s 289 of the Act and s 4(1) of the *Telecommunications (Universal Service Levy) Act* 1991 (Cth) contribute financially to that obligation in direct proportion to their share of interconnect time on the domestic and international network. Telstra is the universal service carrier (Telecommunications (Universal Service Carrier) Declaration (No 1) of 1992) and Telstra, Optus and Vodafone are participating carriers (Telecommunications (Universal Service Levy) Participating Carrier Declaration (No 1) of 1992 (Telstra); Telecommunications (Universal Service Levy) Participating Carrier Declaration (No 2) of 1992 (Optus); and Telecommunications (Universal Service Levy) Participating Carrier Declaration (No 3) of 1992 (Vodafone)).
At the time of writing, the *Telecommunications (Performance Standards) Amendment Bill* 1994 had been introduced into Parliament. That Bill amends the present s 5 definition of "standard telephone service" and introduces indicative performance standards which recognise that services of similar standards should be available to all the people of Australia.

44 Section 94 of the Act, as well as the Telecommunications (Public Mobile Licences) Declaration (No 1) of 1991 (principally clause 3 thereof (relating to terms and conditions for interconnection), clause 5 (relating to access

The intention of the Act is, in the short term, to foster strong network competition in order to offset the evident market power of the established carrier, Telstra (such market power having been acquired as a result of a number of years of monopoly control over telecommunications). In the longer term (that is, the post 30 June 1997 environment), the Government's present intention is to open the market to full competition.

The regulatory regime for the introduction of competition into the Australian market is, to the best of the writer's knowledge, *sui generis*. This article will discuss some of the issues raised by the regulatory regime in the context of a more detailed consideration of the factors identified at (1) to (6) above.

Before proceeding with that detailed consideration, it may be instructive and helpful for the reader familiar with general competition law in Australia, to note the three essential cornerstones of the relationship between the Act and the *Trade Practices Act* 1974 (Cth) (the "*Trade Practices Act*"):

1. the Act excludes the operation of Part IV of the *Trade Practices Act* (relating to anti-competitive conduct) in relation to certain telecommunications activities of carriers.[45] Specifically, the Act exempts carrier behaviour: that is necessary to give effect to a licence condition,[46] to give effect to a direction or determination given by the Minister or Austel,[47] or to give effect to a registered access agreement or a registered variation to an access agreement;[48] and by allowing carriers to refuse to supply a basic carriage service ("BCS") that is not included in that carrier's BCS tariff;[49]
2. the Act links the concept of "dominance", a concept which operates to place certain restrictions on dominant carriers in relation to certain of their activities, to the concept of dominance in s 50 of the *Trade Practices Act* (as in force immediately before the commencement of the *Trade Practices Legislation Amendment Act* 1992 (Cth));[50] and
3. in areas not specifically addressed by the Act, the *Trade Practices Act* continues to provide economic regulation of telecommunications.

## A. Interconnection and Access Arrangements between Carriers

Part 8 of the Act regulates access by carriers to networks and services of other carriers. As a practical matter, at this stage of the introduction of competition, the most significant access issues arise in terms of access to Telstra's network.

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to network information), clause 6 (relating to access to supplementary services, facilities and infrastructure) and clause 13 (relating to volume discounts for AMPS air-time)); and Telecommunications (Public Mobile Licences) Declaration (No 1) of 1992.

45 Refer Part 11, Division 1 of the Act.

46 Section 236(1)(a) of the Act.

47 Section 236(1)(b) of the Act.

48 Section 236(1)(c) & (d) of the Act.

49 Section 237 of the Act.

50 The *Trade Practices Legislation Amendment Act* 1992 (Cth) came into force on 21 January 1993.

The object of Part 8[51] is to promote the long-term interests of consumers of telecommunications services by promoting and protecting competition and enabling carriers to compete with each other on an equal basis. This is said to be achieved by, inter alia:

- protecting each carrier from misuse of market power by other carriers in relation to access to essential facilities or access to consumers; and
- giving each carrier the right to interconnect its facilities to the telecommunications networks of other carriers, on terms and conditions that are fair and which promote the long term interests of consumers.

*(i) Rights of Interconnection and Access*

A carrier has the right to interconnect its "network facilities"[52] to a network or networks[53] of any other carrier(s), on reasonable terms and conditions.[54] It is also a licence condition for both general and mobile carriers that they permit interconnection and the carriage of communications across their networks to and from the interconnected facilities.[55] However, the right of physical interconnection is limited to interconnection for the purpose of the supply by Carrier A of those telecommunications services requested by the interconnecting carrier, Carrier B, in order for Carrier B to supply its licensed telecommunications services.[56]

Furthermore, in addition to the right physically to interconnect network facilities, where Carrier B's request to Carrier A to supply telecommunications services to it (referred to above) is a reasonable request, Carrier A must supply those telecommunications services (on reasonable terms and conditions) so far as is necessary or desirable for the purposes of Carrier B to supply the services in respect of which it is licensed.[57] The Act also provides that certain supplementary access conditions may be included in a carrier's licence conditions.[58]

*(ii) Terms and Conditions of Interconnection and Access*

As just outlined, carriers are required to provide interconnection and access to their networks, as well as supply telecommunications services to each other, on

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51 Section 136 of the Act.

52 "Network facilities" are defined as "facilities that the carrier operates or uses, or intends to operate or use, as part of, in, or in connection with, a network of the carrier, even if another person also operates or uses, or intends to operate or use, some or all of the facilities": s 137(1) of the Act.

53 A carrier's "network" is the part of a telecommunications network which is operated or owned and maintained by it, or in respect of which the carrier has rights of use: s 137(1) of the Act.

54 Section 137(2) of the Act.

55 Clause 3 of the Telecommunications (General Telecommunications Licences) Declaration (No 1) of 1991 and clause 3 of the Telecommunications (Public Mobile Licences) Declaration (No 1) of 1991.

56 Section 137(2) of the Act.

57 Section 137(3) of the Act.

58 Section 138 of the Act. A number of supplementary access conditions have been imposed to date: refer clauses 4 to 6 of the Telecommunications (General Telecommunications Licences) Declaration (No 1) of 1991; clause 2 of the Telecommunications (General Telecommunications Licences) Declaration (No 2) of 1991; clauses 4 to 6 of the Telecommunications (Public Mobile Licences) Declaration (No 1) of 1991; and clause 2 of the Telecommunications (Public Mobile Licences) Declaration (No 2) of 1991.

terms and conditions[59] which are "reasonable". The Act makes it clear that "reasonable" means reasonable having regard to the objects of Part 8 and to any other relevant matter.[60]

The terms and conditions are to be determined by negotiation between the carriers.[61] However, where the carriers are unable to agree, then such terms and conditions are to be arbitrated by Austel.[62] The terms and conditions negotiated by carriers, or arbitrated by Austel, are referred to as "access agreements".[63] Access agreements may, and sometimes must, be varied.[64]

An important provision from the perspective of competition policy, is that regarding the registration of access agreements.[65] Austel must, generally, register an access agreement if it is satisfied that the agreement was made:[66]

- for the purposes of either or both the interconnection of network facilities or the supply of telecommunications services between carriers and contains only terms and conditions dealing with some or all of certain matters set out in s 154(5) of the Act;[67] or
- for the purposes of one or more supplementary access conditions of a licence or licences and contains only terms and conditions reasonably necessary for the purposes of complying with the condition(s); or
- for a combination of these purposes.

If the access agreement is not made for any of the above purposes, then Austel must refuse to register the agreement.[68] However, even if the agreement was made for a permissible purpose, Austel nonetheless has the discretion to refuse to register the access agreement if it is satisfied that:

- the agreement is, or registration of the agreement would be, detrimental to achieving the objects of Part 8;

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59 "Terms and conditions" are defined in s 5 of the Act, in relation to supplying telecommunications services, as including: discounts, allowances, rebates or credits given or allowed in relation to supplying the services; the supply of goods, or of other services, in respect of the telecommunications services; and the making of payments for goods, or for other services, supplied in respect of the telecommunications services.

60 Section 137(1) of the Act. The definition of "reasonable" also qualifies the type of request in relation to which an obligation under s 137(3) of the Act will arise.

61 Section 137(2)(b) and 137(3)(b) of the Act.

62 Arbitrations by Austel are governed by Part 8, Division 5 of the Act.

63 Sections 5 and 156 of the Act.

64 Sections 142 and 143 of the Act.

65 Registration of access agreements is governed by Part 8, Division 4 of the Act.

66 Section 146 of the Act.

67 This sub-section refers to terms and conditions relating to: technical standards for interconnection; points of interconnection; supply of facilities for the purposes of the interconnection, or in connection with the supply of the telecommunications services; supply by a carrier(s) to any other carrier(s) of information about traffic carried on the network(s) or any other information necessary to ensure the efficient supply of telecommunications services by means of the facilities and network(s) concerned; charges payable for the interconnection or the supply of the telecommunications services, for the supply of such facilities or information, or for related matters; any other matters that it is reasonably necessary to deal with for the purposes of the interconnection, or in connection with the supply of the telecommunications services; and matters incidental to a matter of a kind referred to above.

68 Section 146(4) of the Act.

- the agreement was made in breach of the Act, or in breach of an obligation imposed under the Act; or
- giving effect to the agreement would involve a breach of the Act, or breach of an obligation imposed under the Act.

Registration of the access agreement has a number of important consequences and effects. First, registration of an access agreement confers immunity from the restrictive trade practices provisions in Part IV of the *Trade Practices Act*.[69] The immunity applies to the making of the agreement and to acts undertaken pursuant to it. The making of an access agreement (or a variation thereof) is immune from the operation of trade practices law so long as the agreement or variation is registered, or, if the agreement or variation is no longer registered, so long as it has been registered. Furthermore, acts or omissions which are necessary to comply with, or give effect to, a registered access agreement, are also exempt.

Secondly, in determining whether a carrier has contravened the non-discrimination and tariffing rules (discussed further below) the supply of a basic carriage service under a registered access agreement, as well as any acts or omissions in connection with the supply of such a service, must be disregarded.[70]

*(iii) Pricing of Interconnection and Access*

The Government chose to implement a regime of administered interconnection charges on the basis that, at the initial stages of competition, a new competitor would lack commercial market power with which to negotiate reasonable terms and conditions for access to the incumbent carrier's network.[71]

The Government considered that the negotiating disadvantage suffered by a new entrant consequent upon lack of market power, would act as a substantial barrier to entry into the market by potential competitors (overseas experience indicated that charges related to interconnection and access represented a large proportion of a new competitor's total costs, particularly during the initial stages of competition).[72]

The Minister may determine charging principles that are to be applied in agreeing on or determining terms and conditions about charges payable for interconnection and access.[73] The Act requires that access agreements comply with any such charging principles determined by the Minister.[74]

There are three classes of interconnection charges which have been determined:

1. initial interconnection and access charges, based on the Directly Attributable Incremental Cost ("DAIC") concept;[75]

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69 Sections 145, 236(1)(c), 236(1)(d) and 236(2) of the Act.

70 Section 202 of the Act.

71 Note 27 supra, p 47.

72 *Ibid.*

73 Part 8, Divison 3 of the Act.

74 Section 141 of the Act.

75 Austel determined that a long run unit incremental cost approach would be used to establish the costs incurred by Telstra from Optus interconnecting to Telstra's network. Austel has developed cost identification and cost attribution principles (based on determining whether the particular costs are call product dependent and are traffic sensitive) to determine what constitutes a directly attributable incremental cost: note 27 *supra*, p 48.

2. initial interconnection and access charges, including supplementary access charges, negotiated between the carriers;[76] and
3. subsequent interconnection charges, which replace initial interconnection charges, upon the loss of market dominance by the incumbent carrier (Telstra).[77]

Category (1) above encompasses specific charges which are set out in Schedules 1-3 of the Telecommunications (Interconnection and Related Charging Principles) Determination (No 1) of 1991 (the "Telecommunications Interconnection Determination") relating to the following services:

- per conversation minute charges for the use of customer access lines and facilities serving customers located in central business districts, metropolitan regions and country regions;
- charges for carriage and switching in those same geographic locations;[78] and
- charges for international carriage and switching.[79]

The Telecommunications Interconnection Determination makes it clear that the relevant carriers may:

- negotiate a balance or mix of charges for interconnecting a new carrier's facilities to an existing carrier's customer access network that is different from the scheduled charges, provided that the charges so negotiated are within the same overall weighted average of charges;[80]
- negotiate a balance or mix of initial intra-area charges (such as peak/off peak, metropolitan/non-metropolitan or flagfall/use) that is different from the scheduled charges, provided that the charges so negotiated recover the same proportion of relevant costs;[81]
- where interconnection charges are not scheduled, or a scheduled charge has ceased to apply (discussed below), commercially negotiate from time to time the relevant terms and conditions (failing agreement, such charges would be as determined by Austel);[82]
- agree to express charges by reference to standard tariff levels (such as by way of discounts) or in some other form, provided that Austel is able, where necessary, to establish the effective overall equivalence between charges so expressed and the principles set out in the Telecommunications Interconnection Determination;[83]

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76 These charges are required to at least recover costs necessarily incurred in providing a particular service, including a commercial return on the assets used to provide the service.

77 Telecommunications (Interconnection and Related Charging Principles) Determination (No 1) of 1991.

78 These charges, comprising per call attempt and per conversation time elements, differ depending on the time of day of the call. There are also differing charges for local exchange switching, junction network carriage and trunk exchange switching.

79 These changes are based, essentially, on differing per call attempt plus per conversation minute charges depending on the country, plus additional charges to recover any settlement fees payable by the existing carrier to its overseas correspondent carriers.

80 Note 77 *supra*, clause 11(2).

81 *Ibid*, clause 12(5).

82 *Ibid*, clauses 7 and 9.

83 *Ibid*, clause 3(2).

- where amounts or rates of charges in respect of a particular category of interconnection charges are scheduled, agree to initial charges in respect of that category in some derivative form (such as by way of averaging or aggregation) provided that the calculation of the derivative form is made available to Austel.[84]

Any negotiated rates in respect of interconnection charges or supplementary access charges must comply with the principles set out in clause 3 of the Telecommunications Interconnection Determination.

Clauses 11, 12, 13 and 14 of the Telecommunications Interconnection Determination set out the circumstances in which the scheduled charges cease to apply. Clauses 11, 12 and 13 apply, respectively, to initial customer access network charges, initial intra-area charges for carriage and switching, and initial charges for international carriage and switching. These clauses variously set out either or both of:

- certain events; or
- various traffic shares with an exception where the new carrier establishes that the existing carrier is still in a position to dominate the relevant market,

which will cause the scheduled charges to cease to apply.

Clause 14 creates a general mechanism for terminating the initial charges. It provides that, if an existing carrier is no longer in a position to dominate a particular market, the initial interconnection charges payable for the purpose of enabling the new carrier to provide services in that market cease to apply.

Finally, the Telecommunications Interconnection Determination provides that:

1. if a new carrier has nominated to the Commonwealth a network rollout commitment date in respect of a particular domestic route, the initial interconnection charges payable by that carrier for the purpose of enabling that carrier to provide services on that route cease to apply after that date or, if Austel agrees, a later substituted date;[85]
2. where an access agreement provides that the amounts or rates of the interconnection charges included in a particular category of interconnection charges are to continue for a specified period, then clauses 12, 13 and 15 (discussed above) do not apply in relation to those interconnection charges.[86]

The charges so determined are intended to reflect the type and level of charges which would be established in a competitive telecommunications market through commercial negotiations between carriers with relatively equal market power.[87]

The initial interconnection charges are theoretically designed to recover both the capital costs associated with the incumbent carrier providing existing and new network capacity to a new carrier, as well as the variable operating maintenance

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84 *Ibid*, clause 3(3).
85 *Ibid*, clause 15.
86 *Ibid*, clause16.
87 Note 27 *supra*, p 48.

costs directly attributable and incremental by virtue of the interconnecting carrier's use of the network.[88]

Theoretically, competitive advantage will be achieved only through efficiency improvements leading to price reductions, and other non-price factors, rather than as a result of a dominant carrier's ability to overcharge when providing crucial network facilities.

*(iv) Comment on Interconnection and Access*

In a market previously characterised by monopolistic control, the extent to which the structured interconnection and access prices do reflect the "type and level of charges which would be established in a competitive telecommunications market through commercial negotiations between carriers with relatively equal market power" (as Austel suggests) can, at most, be an educated guess. Yet, such prices are a key part of the network competition reforms. If these prices are set too high, then full competition might be delayed because non-dominant carriers will presumably require longer to acquire sufficient market power because their pricing will also be high (in order to recover high costs) and vice versa.

A related comment may be made concerning the criteria for cessation of the scheduled interconnection and access charges. Although the criteria based on traffic share do not purport to enumerate the moment when a carrier is no longer dominant in a relevant market, it could be said that the combination of such traffic share triggers and the placing of the onus of proof of dominance on the new carrier in clauses 12(3) and 13(3) of the Telecommunications Interconnection Determination has this de facto effect. In light of the Act's object being to create a sustainable competitor to the incumbent carrier, it might have been more appropriate either to remove such triggering events entirely from the regime and instead retain merely a loss of dominance trigger (as presently found in clause 14 of the Telecommunications Interconnection Determination), or to reverse the onus of proof of loss of dominance to the incumbent carrier.

Although one might argue in response that it is always open to the relevant carriers to negotiate other charges (provided this is done in accordance with the Act and the Telecommunications Interconnection Determination), the difficulty with this rejoinder is that it presupposes that the parties are in a position of equivalent bargaining power. And yet, the competition reforms introduced by the Act are designed on the very basis that the parties do *not* have such equivalency of bargaining power.

In any event, the Telecommunications Interconnection Determination sets international market share triggers (either 5 per cent or 10 per cent) based on traffic originating in Australia. An alternative approach would be to use call revenue turnover (including both originating and terminating revenue) in the international market for the purposes of assessing dominance.[89] In international

88 *Ibid.*

89 Bureau of Transport and Communications Economics, *The Australian Telecommunications Market - When Does Dominance Cease?*, Working Paper 6, AGPS (December 1992) p 73.

telecommunications markets, there can be a considerable price differentiation between peak and off-peak services. Accordingly, utilising a measurement based on output levels of traffic may "significantly misrepresent" the actual market position of carriers.[90] In addition, since competition, particularly initially, can be expected to focus on the more lucrative high traffic routes, even low market shares based on traffic levels may represent high revenue which will not be apparent from mere traffic percentages.[91]

The Bureau of Transport and Communications Economics has further noted (in its Dominance paper, p 74) that:

> The exclusion of terminating traffic, which is estimated to account for around one-third of international carrier(s)' revenue, from the calculation of the market share triggers may also introduce a further distortion. This aspect would be largely ameliorated in overseas applications of concentration measures as most countries have mandated requirements for proportional return traffic between carriers. However, the Australian regulatory approach differs in that it is up to AUSTEL's discretion to impose proportional return traffic requirements on international market participants. In view of this, it is suggested that market share measures at least should take account of both originating and terminating revenue sources when used for public policy purposes.

Equally, it can be, and has been, argued[92] that Australian carriers compete in the market for outgoing calls, not terminating calls. It may well be that there is a distinct market for termination within Australia, where the "customers" are the international telecommunications operators, not Australian consumers. To the extent that there may be competition policy issues in any such market, they would fall within the regulatory regime of the Telecommunications International Code of Practice and the Telecommunications (International Code of Practice) Direction (No 1) of 1992, which is binding on carriers under s 78 of the Act.[93] The Code of Practice is directed towards preventing the misuse of market power by international telecommunications operators.

## B. The Price Capping/Control Arrangements

### *(i) The Arrangements Generally*

The aim of the price control arrangements is to prevent forms of anti-competitive conduct, such as predatory pricing and cross-subsidisation. The price control arrangements are based on the concept of price capping and are a form of incentive-based regulation.[94]

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90 *Ibid*, pp 73-4.

91 *Ibid*, p 74.

92 *Ibid*.

93 The power of the Minister to determine the Code of Practice is found in s 77 of the Act.

94 Rate of return regulation has a tendency to distort resource allocation and entails costly monitoring and review procedures. By comparison, incentive based regulation theoretically, at least, removes a number of these problems by providing positive incentives to improve efficiency and performance, as profits in excess of the "efficiency dividend" distributed to consumers by way of price cuts through the price cap mechanism, are allowed to be retained: note 27 *supra*, p 49.

The price control scheme operates from 1 July 1992 to 30 June 1995 and is set out in the AOTC Carrier Charges Price Control Determination 1992.[95] The scheme comprises two components: the price caps and the notification and disallowance provisions. The Minister may determine that specified Telstra charges are subject to price control arrangements.[96]

Carrier charges for the following services are subject to price control arrangements: connections; rentals; local, STD and international calls; domestic and international leased lines; and cellular mobile telephone services.[97]

The specific numerical values of the price caps are set out in Part 3 of the AOTC Carrier Charges Price Control Determination 1992. Essentially, there are 3 forms of price cap - a price movement equal to CPI, a price movement equal to CPI minus 2 per cent, and a price movement equal to CPI minus 5.5 per cent. The first price cap applies to (taken individually) connections and rentals of the standard telephone service, and local and STD calls. The remaining two price caps apply to specified baskets of services.

The second component of the price control arrangements - notification and disallowance by the houses of parliament[98] - requires Telstra to notify certain proposed price changes to the Minister who may then disallow the proposed price changes if he or she considers that disallowance would be in the public interest.[99] "Public interest" however, is neither defined in the Act nor elaborated upon in the Explanatory Memorandum to the Act.

Prior Austel consent to a price increase or decrease is not generally required.[100] An alteration of a carrier charge must not, in Austel's opinion, be a misuse of the

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95 This Determination takes effect as a Ministerial order under the *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth).

96 *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth), s 20(1).

97 AOTC Carrier Charges Price Control Determination 1992, cl 8(1). Services not included in the above list are: maritime mobile services (including INMARSAT, Seaphone and Radphone services); public access cordless telephone services; and 007 mobile telephone services (clause 8(2)). Price capped services do not include: inter-carrier access, carriage or haulage (that is, charges arising under the interconnection and access arrangements between the carriers); service provider access or per call charges to service providers; CustomNet, CustomNet Horizon and other virtual private network ("VPN") and Centrex style services; public access cordless telephone services; operator assisted calls and directory assistance; premium telephone services (such as 0055 services); cabling of business premises; and public payphone calls.

98 *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth), s 19(2). See also *Acts Interpretation Act* 1901 (Cth), s 46A.

99 *Australian and Overseas Telecommunications Corporation Act* 1991 (Cth), ss 23 and 24; AOTC Carrier Charges Price Control Determination 1992, cl 17.

100 Clauses 12-16 of the AOTC Carrier Charges Price Control Determination 1992 set out the circumstances where prior Austel consent is required. Essentially, unless Telstra has complied with certain prior notice and consultation requirements (generally, 30 days), Austel consent is required if Telstra's charges for any service subject to the price control arrangements are proposed to increase by a sum greater than the sum of the CPI and the lowest price charged for that service during the preceding year (other than a price charged for less than 5 days) or a proposed price alteration is caused by a variation to existing call zones. As Leonard points out, Telstra is obliged to give Austel such information as will enable Austel to assess whether its consent should be given, including "information demonstrating that the proposed price alteration is justifiable on the grounds of costs (AOTC Carrier Charges Price Control Determination 1992, cl 15(2)). However, there is no guidance given to Austel as to how it should relate this cost information to Telstra's proposed price and, "in particular,

carrier's market power and, if the alteration is a price increase as a result of a reduction in the area of a local call zone, the carrier must have given, in Austel's opinion, sufficient consideration to the impact of the alteration on persons in the community affected by the alteration.[101]

*(ii) Comment*

As might be expected, the price cap regime has come in for criticism from a number of areas. Not surprisingly, Telstra (as essentially the dominant carrier) has criticised the regime as being overly restrictive and unnecessarily intrusive. The price control arrangements are administratively complex, yet a number of services remain outside their scope. It may be that, with more time and experience, a simpler regime could be created, but balanced against this is the legitimate commercial expectation of a stable regulatory regime so that forward business planning may be undertaken.[102]

The regime has been questioned for its ability to fulfil its objective (namely, limiting a dominant carrier's capacity to cross-subsidise deep price discounting in relation to services the subject of intense competition by making counter price increases in less or non-competitive service areas).[103] For example, it may be that the baskets of services are set too broadly (that is, there may be too much scope for price rebalancing within particular baskets). The inclusion of downward caps, in order to protect against anti-competitive deep price discounting, might also have been appropriate.[104]

In addition, there have been criticisms that the arrangements are not sufficiently detailed to achieve social ends. For example, geographical averaging,[105] although never a legal obligation, has often been viewed as a device for securing social equity between urban and rural communities (a particular concern in Australia with its small population widely dispersed over a large land mass). Accordingly, any selective price reductions by way of geographic de-averaging, might detrimentally affect the social equities which have generally been sought in the past.

## C. The Tariffing, Pricing and Non-discrimination Principles

*(i) The Tariffing and Pricing Principles*

A tariff must be filed with Austel,[106] and, where a basic carriage service ("BCS")[107] is supplied to anyone other than another carrier or internally, then the

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what rates of return it should utilise as baselines for determining the reasonableness or otherwise of proposed price changes": P Leonard, "AOTC and Price Caps: Will the Cap Fit?" (Sep 1992) *Australian Communications* 43 at 44.

101 AOTC Carrier Charges Price Control Determination 1992, cl 12.

102 Leonard, note 100 *supra*.

103 *Ibid.*

104 *Ibid.*

105 That is, a flat rate over specified distances at specified times of the day throughout Australia.

106 Section 190(2) of the Act.

107 Section 174(1) of the Act provides that a telecommunications service is a basic carriage service if, and only if, it is a service for "basic communications carriage" between 2 or more distinct places and is supplied by means

service must be included in a BCS tariff of the carrier which is in force.[108] In the absence of an agreement between a carrier and a customer, the terms and conditions of supply of a service are those set out in a current BCS tariff.[109]

The Act sets out a number of requirements for a BCS tariff.[110] Austel may disallow a non-complying tariff,[111] and a carrier may vary or revoke its BCS tariff.[112] However, Austel may disallow variations of a BCS tariff in certain circumstances.[113]

Once a particular kind of BCS has been included in a carrier's BCS tariff, the carrier may restrict the kinds of higher level services which other persons may supply by use of that particular kind of BCS, provided that it complies with the requirements set out in the Act.[114]

A carrier may refuse to supply a BCS which is not included in its BCS tariff.[115] However, a carrier may not refuse to supply a BCS if, inter alia, it is required to supply the service under the interconnection arrangements.[116]

Over and above these general obligations, a dominant carrier is subject to particular restrictions in relation to the manner in which untariffed BCSs may be used. A carrier must not supply a BCS of a particular kind for use by the carrier for, or in relation to, supply by that carrier of a particular kind of higher level service ("HLS"), if the carrier is in a position to dominate a market for that kind of BCS. The relevant market is the market in which other suppliers of HLS of that kind acquire BCSs of that kind for use for, or in relation to, their supply of such HLS.[117] However, where a BCS tariff of the carrier is in force and the BCS is

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of at least 1 reserved line link, or facilities including at least 1 reserved line link, or by the use of satellite-based facilities. Section 174(2) of the Act provides, in turn, that a service for "basic communications carriage" is a telecommunications service that consists only of functions each of which is involved in:

- establishing, maintaining or terminating a connection across the telecommunications network by means of which the service is supplied; or
- modifying a connection after it has been so established; or
- carrying a communication across the network.

The supply of customer equipment is not a basic carriage service (s 174(3) of the Act).

A "higher level service" is defined in s 5 of the Act as a telecommunications service that is not a basic carriage service.

Pursuant to its power under s 176 of the Act, Austel has issued one opinion relating to basic carriage services. The final opinion, which was released on 4 October 1992, relates to certain of Telstra's intelligent network services.

108 Section 194(1) of the Act. Note that a BCS supplied under a registered access agreement is excluded from the tariffing rules: s 202 of the Act.

109 Section 200 of the Act.

110 Sections 190(5)-190(12) of the Act.

111 Section 191 of the Act.

112 Section 192 of the Act.

113 Section 193 of the Act.

114 Section 196 of the Act.

115 Section 237 of the Act.

116 Section 237(3) of the Act.

117 Section 195(1) of the Act.

included in the tariff, then a dominant carrier may supply a BCS of that kind for use by the carrier for, or in relation to, its supply of a HLS of that kind.[118]

In addition, a dominant carrier is obliged not to favour itself when using its own BCS to supply certain services.[119]

Where a carrier:

- is in a position to dominate a market for a particular kind of BCS; and
- a BCS tariff of the carrier was in force in the same form throughout a period during which the carrier supplied a BCS of that kind, in that market, to a person; and
- that kind of BCS was included in that tariff as in force in that form,

then the dominant carrier must charge in accordance with its BCS tariff.[120] By contrast, a non-dominant carrier is only obliged not to exceed the charges set out in its BCS tariff.[121]

*(ii) The Non-discrimination Principles*

Subject to certain exceptions,[122] a carrier which is in a position to dominate a market for a particular kind of telecommunications service must not discriminate between persons who acquire in that market telecommunications services of that kind, in relation to:

- the charges for the services; or
- the terms and conditions on which the services are supplied.[123]

All carriers (dominant or otherwise) must not, in relation to the supply of BCSs, discriminate against a person for the reason, or for reasons including the reason, that the person supplies, or proposes to supply, eligible services under a class licence, or uses, or wishes to use, eligible services supplied under a class licence.[124] In this context, "discriminate" includes discriminate in relation to the charges for the service concerned, the performance characteristics of the service concerned or the other terms and conditions on which the service concerned is supplied.[125]

In addition, carriers must not vary charges for BCSs that they supply, or propose to supply, to a person if the reason, or one of the reasons, for the variation

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118 Section 195(2) of the Act.

119 Section 187 of the Act.

120 Section 197 of the Act. The Explanatory Memorandum, in commenting on the above prohibition, explained that:

> The approach based on 'dominance'... is used for two reasons ... the provision assumes that a dominant carrier that discriminates is having the effect of lessening competition. Second, it is intended to provide regulatory relief to consumers up until the point at which genuine competition in a market commences."

121 Section 198 of the Act.

122 Prescribed telecommunications services which are excepted from the general prohibition are set out in the Telecommunications (General) Regulations 1991.

123 Section 183(1) of the Act.

124 Section 184(1) of the Act.

125 Section 184(2) of the Act.

is that the carrier also supplies, or does not also supply, other telecommunications services to the person.[126]

However, most of the above[127] does not apply where the discrimination makes only reasonable allowance for differences in the costs, or likely costs, of supplying services, if the differences result from any of the following:

- the different quantities in which the services are supplied;
- the different transmission capacity needed to supply the services;
- the different places from, or to which, the services are supplied;
- the different periods for which the services are supplied;
- the different performance characteristics at which the services are supplied; or
- other prescribed matters (of which, to the best of the writer's knowledge at the time of writing, there are none).[128]

In addition, where the discrimination in relation to the charges for telecommunications services would make only reasonable allowance for differences in the other terms and conditions on which the services are supplied, most of the above prohibitions do not apply.[129]

As can be seen, the question of when a carrier is dominant has significant ramifications for its general ability to price and set terms and conditions. The question of when a carrier is in a position to dominate a particular market is discussed in detail below.

*(iii) SPA/FlexiPlan Dispute*

The question of interpretation of the anti-discrimination provisions of the Act has become a particularly controversial issue, in particular in relation to Telstra's Flexiplans and Strategic Partnership Agreements ("SPAs").[130] At the time of writing, these arrangements are the subject of litigation in the Federal Court of Australia (Sydney Registry) between Optus and Telstra.[131]

When the arrangements were introduced by Telstra, Optus essentially argued that Telstra was able to utilise its advantage as the monopoly incumbent provider of the local loop and other non-competitive services, to expand the

126 Section 184(3) of the Act. This provision has been the subject of much debate. One particularly thorny issue has been whether s 184(3) is breached by the offering of a discount across the aggregate of usage levels of a number of services. This is one of the areas of dispute in the Optus/Telstra litigation (referred to below).

127 The exception being the prohibition in s 184(3) of the Act (discussed above).

128 Section 185(1) of the Act.

129 Section 185(2) of the Act.

130 The latter are pricing and management options structured for customers with large, diverse and complex telecommunications needs. It is asserted that discounts derive from the cost savings that such arrangements can provide to the carrier, which are then passed on to the customer on their aggregate telecommunications account.

131 The litigation focuses primarily on:

- whether the discrimination under Telstra's SPAs is cost-related;
- whether the anti-discrimination provisions were intended to prohibit charging packages such as Flexiplans; and
- the interpretation of s 184(3) of the Act (as discussed above): P Leonard, "Unintended (and Other) Consequences" (May 1994) *Australian Communications* 67 at 68.

telecommunications services base upon which the discounts were offered.[132] By contrast, since Optus was unable to compete in local call services and in relation to a significant amount of long distance services, Optus would have to offer a substantially higher effective rate of discount to compete with the nominal discount rate applicable under SPAs and Flexiplans.[133]

In submissions to Austel, Telstra effectively argued,[134] inter alia, that since the Act provided particular rules for retail pricing by carriers, then, assuming the rules were complied with, there should be no intervention by Austel unless the pricing contravened the *Trade Practices Act*. According to Telstra, pricing under the SPAs and Flexiplans did not have the purpose, or would not be likely to have the effect, of substantially lessening competition in a relevant market.

After lengthy discussions between Austel, Optus and Telstra, Austel released its "Discretionary Charging Options - Anti-Discrimination and Competition Policy Principles" (the "Discretionary Charging Principles") on 15 February 1993. The Discretionary Charging Principles were to apply for a period of six months from the date of their release. Austel determined that, under the Act, a dominant carrier could file a tariff containing a discretionary charging option that was either cost-based or non-cost-based (but not both).[135] Although s 185 of the Act was often interpreted as permitting only cost-based discrimination by a dominant carrier, Austel relied upon advice from the Commonwealth Attorney-General to the effect that s 185 also permitted non-cost-based discrimination in charging options such as Flexiplans, where these were "a reasonable arrangement having regard to accepted commercial considerations and [the packaging's] object or likely effect does not entrench or further market dominance by a carrier".[136]

Austel stated that it intended:

> to disallow a proposed tariff filing relating to a non-cost-based discretionary charging option by a dominant carrier if it includes features that AUSTEL concludes are likely to have a net anti-competitive effect. A net anti-competitive effect would result where the option is likely to result in a detriment to competition that outweighs the consumer benefit likely to result from the option.[137]

Features that were likely to have a net anti-competitive effect included, in Austel's view:

- the combining or "bundling" of local calls and/or mobile originated calls with other service types;
- discrimination based on the mobile network on which a call was terminated;
- excessive constraints on entry or exit (for example, an exit notice period in excess of one month or exit fees in excess of the subscription associated with a one month notice period); and

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132 P Leonard, "Competing Carriers and Competing Regulators" (June 1993) *Australian Communications* 49 at 50.

133 *Ibid.*

134 *Ibid.*

135 Discretionary Charging Principles, clauses 5 and 6.

136 Note 132 *supra.*

137 Discretionary Charging Principles, cl 12.

- cumulative discounts achieved by combining separate discretionary charging options or by combining a non-cost-based discretionary charging option with a cost-based option.[138]

Austel was of the view that SPAs were a form of cost-based discrimination and were therefore not subject to the 'net anti-competitive effect' test.[139]

In the 1992-93 period, Austel disallowed four Flexiplans proposed by Telstra. The plans bundled local calls with other types of calls or combined differing discount options and were considered by Austel to have a net anti-competitive effect.[140]

Following the release of the Discretionary Charging Principles, Optus, not apparently agreeing that the Principles constituted sufficient discipline on discriminatory behaviour by a dominant carrier, commenced the litigation referred to above. That litigation focuses on two issues:

- are the relevant charging options cost-based; and
- to the extent that they are not, do the pricing rules permit non-cost-based price differentiation and if so, subject to what limitations?[141]

Since the commencement of that action, however, the Federal Government has introduced the Telecommunications Amendment Bill 1994 into Parliament.

*(iv) Telecommunications Amendment Bill 1994*

The Telecommunications Amendment Bill 1994 (the "Bill"), presented and read for the first and second time on 23 March 1994, is intended to correct what were described in the second reading speech as "unintended consequences ... in the light of experience in an increasingly competitive market". The unintended consequences relate to possible "technical breaches" of ss 183 and 185 of the Act by certain tariffs, such as Telstra's Flexiplans. If passed, the resulting Act would be taken to have commenced on 15 March 1994.[142]

The Bill is clearly directed towards the heart of the current litigation between Optus and Telstra discussed above. It retains the prohibition on discrimination found in s 183 of the Act (discussed above) but recasts the exceptions found in ss 185(1) and 185(2) of the Act. The Bill also provides that nothing in Part 9, Division 4 of the Act (relating to the prohibition of discrimination) authorises or approves any act or thing, or any kind of act or thing, for the purposes of s 51(1)(a) of the *Trade Practices Act*.

The amendments introduced by the Bill are relatively complex. Due to spatial limitations, the following is intended merely as a general introduction to the amendments and not an exhaustive exposition.

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138 *Ibid*, cl 13.

139 Note 132 *supra*.

140 Austel, *Competitive Safeguards and Carrier Performance 1992-1993* (Report to the Minister for Communication under s 399 of the *Telecommunications Act* 1991), AGPS (December 1993) p 42.

141 Note 132 *supra*.

142 Clause 2 of the Bill. 15 March 1994 was the date on which the Minister announced the proposed legislative changes.

There are to be three classes of exceptions to the general prohibition of discrimination:

- where Austel has permitted the discrimination;
- where the discrimination is provided for in a tariff and, following a request by a carrier for a decision by Austel, the discrimination has been permitted by Austel;[143] and
- where the discrimination is under a "legitimate charging option".

The first and third of these classes will be considered in turn.

(a) Austel-permitted Discrimination

Under the Bill, Austel is empowered to decide that specified discrimination, or specified discrimination of a kind, is permitted. However, Austel must not so decide unless it is satisfied that the relevant discrimination is justified by:

- a non-insignificant difference in costs borne by the carrier that will be, or is likely to be, related to the discrimination;[144] or
- the community interest in promoting the objects in ss 3(a)(ii) and (iii) of the Act;[145] or
- the desirability of trial programs, pilot programs and demonstrations being conducted that promote the Act's objects.[146]

The Bill sets out certain non-exhaustive matters to which Austel may have regard, including:

- the quantities in which telecommunications services that would be affected by the decision are supplied;
- the transmission capacity needed to supply the services;
- the places from, or to which, the services are supplied;
- the periods for which the services are supplied;
- the performance characteristics at which the services are supplied;
- network matters relating to the supply of the services; and
- the administrative and/or operational costs in relation to the services.

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143 This would apply to all tariffs, whether or not in place before the commencement of the amending Act. If Austel does not permit the discrimination, the exception would not apply, and would be taken never to have applied.

144 According to the Explanatory Memorandum, "the difference in costs may consist of cost savings or other benefits to the carrier or additional costs borne by the carrier. It must be a difference in costs that is or is likely to be related to the discrimination and by reason of which the discrimination can be reasonably considered to be economically or otherwise commercially justified. However, there is no requirement for the cost difference to be justified by relative differences in the costs of supplying different customers or otherwise on the basis of any customer by customer comparison".

145 Namely, that the standard telephone service, in view of its social importance, is reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business and is supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community.

146 According to the Explanatory Memorandum, this provision "will ensure that the carriers can develop and test innovative concepts of service provision in a commercial environment, thereby improving the scope for technical and service expansion of the capabilities of the telecommunications networks and eventually offering the public both cost and service benefits". Trials relating to extending the boundaries for untimed local calls in return for a higher flat rate charge, and trials relating to caller identification systems, are cited as examples.

Austel may revoke or vary a discrimination decision if it is satisfied that there has been a material change in circumstances or a decision was based on materially incorrect information (and would not otherwise have been made) or both. A decision to permit certain discrimination does not prevent Austel exercising any other power it has under the Act to disallow a tariff, even if the Act or omission constituting the discrimination is required or permitted under the tariff.

(b) "Legitimate Charging Option" Discrimination

For the purposes of the relevant exception, a telecommunications service is supplied by a carrier under a legitimate charging option if, at the time it is supplied, supply of the carrier's services of that particular kind on the same terms and conditions as the terms and conditions on which that service is supplied, is available to all, or all but an insubstantial minority of:

- customers, business customers, or residential customers, to whom supply of those services is technically feasible; or
- customers included in a class of persons determined by Austel to fall within the exception (having regard to the matters set out in the Bill) and to whom supply of those services is technically feasible.[147]

The Bill states that, without limiting what is or is not technically feasible, supply of a telecommunications service of a particular kind to customers is, for the particular purposes, not technically feasible if, at the time in question, supply is not feasible using the facilities available to the carrier at that time for supplying such a service to those customers.

New definitions of "customers" and "terms and conditions", for the purposes of s 185, have been included.

According to the Explanatory Memorandum, the amendments directed towards the new "legitimate charging option" discrimination exception will ensure that certain kinds of differentiation, which could be considered discriminatory, will not be treated as being in breach of the anti-discrimination provisions of the Act. These include:

- time of day (peak/off peak), day of the week (eg reduced Sunday rates) and similar charging differences;

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147 The Explanatory Memorandum states that:

> A charging option will be a legitimate charging option where the service is available to be acquired on the same terms and conditions by all (or all but an insubstantial minority of) customers .... *where those terms and conditions are broadly of appeal.* So as a general rule, charging options that are only offered to selected persons will not fall within this exception. (emphasis added)

Presumably, SPAs, which are only offered to select business customers (those with in excess of $1 million per annum expenditure on telecommunications services with Telstra) would not fall within this exception. However, most Flexiplan tariffs probably would so fall.

With respect, the Explanatory Memorandum purports to add something to the express words of the Bill which is not warranted (the words "broadly of appeal" do not appear in the Bill) and which could be interpreted as adding a further test to the provision (assuming, of course, that recourse to the Explanatory Memorandum was necessary in accordance with the principles of statutory interpretation).

- tariffing of different charges for different service or performance features (eg a charging option under which charges or rates vary according to different performance characteristics or different amounts of service capacity); and
- flat and incremental volume-based discounts (eg that apply to customers who exceed particular levels of aggregate service charges or numbers of service connections).

(c) Disallowing Non-competitive Tariffs Under the Bill

Austel has also been given an additional power to disallow a tariff the continued operation of which would be anti-competitive in any market for any telecommunications service (notwithstanding that the tariff may otherwise comply with the Act). However, the operation or continued operation of a tariff would be taken to be anti-competitive in a market if and only if:

- the operation or continued operation of the tariff, or provisions of the tariff; or
- the operation or continued operation of the tariff, or provisions of the tariff, in conjunction with other tariffs or commercial arrangements,

has, or is likely to have, the effect of materially and adversely affecting the development and/or maintenance of commercially sustainable competition in that market.

According to the Explanatory Memorandum:

> This test is deliberately different from those applicable under *the Trade Practices Act* 1974 to cope with the particular issues in transition from the former regulated monopoly market to full competition.

Clause 7 of the draft Telecommunications (Price Competition) Direction (No 1) of 1994 (the "Draft Direction"), to be introduced after the amending Act commences, sets out certain circumstances in which Austel must consider whether the operation or continued operation of a tariff, or provisions of a tariff, would have an anti-competitive effect in a market.[148]

Clause 6 of the Draft Direction sets out certain matters to which Austel must have regard in considering whether the operation or continued operation of a tariff, or provisions of a tariff, would have an anti-competitive effect in a market. Those matters are:

- the nature and effect of barriers to entry into, and effective participation in, the market;
- the dynamic characteristics of the market, including growth, innovation and service differentiation;
- the expected long term effect on competition in the market;
- whether the tariff would have the effect, or would be likely to have the effect, of:
  - eliminating or substantially damaging a competitor of the carrier in that market or any other market for a telecommunications service;

148 Austel will probably be under significant pressure from various segments of the industry to reviews SPAs and Flexiplans as a matter of priority, since these have been highly contentious.

- preventing, delaying or deterring the entry of a person into that market or any other market for a telecommunications service; or
- deterring or preventing a person from engaging in competitive conduct in that market or any other market for a telecommunications service;

- whether predatory pricing is involved; and
- any other matters that Austel considers relevant.

(d) Comment

As Leonard[149] and others have pointed out, the Bill arms Austel with a number of wide, powerful discretions. Full recourse to the due processes of law would be reduced to a system of limited judicial review of Austel's decisions. The extent to which that shift gives cause for concern is heavily dependent upon the ability of Austel to face up to some of its toughest challenges (and tests) to date in its administration of the new rules. For the moment, the jury is out on that question.

## D. Unbundling Directions By Austel

*(i) The Policy*

Once a telecommunications service is classified as a basic carriage service, a carrier has the right, under the Act, to refuse to supply that service to the public generally.[150] However, the Act also modifies that right by creating rules and procedures to enable Austel to direct a carrier to unbundle a basic carriage service.[151]

According to the Explanatory Memorandum, the unbundling regime has two main functions:

> First, it will prevent a dominant carrier that is supplying a BCS from precipitately withdrawing that service where this will have significant consequences for existing users of that service.
>
> Second, it will allow for a structured process for "unbundling" of BCS's. "Unbundling" in this context means requiring a carrier to make available "lower level" basic carriage services that are necessary to provide other telecommunications services. This process will promote competition by allowing service providers to use these "building blocks" to construct other telecommunications services from an equal base.
>
> It is, however, important that such unbundling of BCS's actually benefits the long term interests of consumers by taking proper account of what is technically practicable, and of the need to promote long term competition between the carriers by ensuring that their rights have practical value.

149 Leonard, note 131 *supra* at 70.

150 Section 237 of the Act.

151 Part 9, Division 3 of the Act.

*(ii) The Unbundling Scheme*

Austel may, at any time, hold a public enquiry about whether it should direct a particular carrier to supply a particular basic carriage service to the public generally. It may hold such an enquiry on its own initiative, or because of a request from a person to hold such an inquiry.[152]

If Austel is satisfied that:

1. having regard to:
   - the technology used by, or available to, the carrier; and
   - whether the costs that would be involved in so supplying, and charging for, the service are reasonable; and
   - the effects that so supplying, and charging for, that service will have on the operation and performance of the telecommunications networks that the carrier operates,

   it is technically feasible for the carrier to supply, and charge for, that service as a service distinct from any other telecommunications service; and
2. the carrier is in a position to dominate a market for that service; and
3. unless the direction is given, there will be a substantial lessening of competition, within the meaning of the *Trade Practices Act*, in a market for any other telecommunications service; and
4. complying with the direction will not significantly reduce the carrier's ability to use facilities under its control to supply other telecommunications services in a way that enables the carrier to exploit the economies of scale and scope available to it because it controls those facilities; and
5. the carrier's compliance with the direction will not unduly affect the practical ability of the carriers to be the primary suppliers of telecommunications services in Australia,

then Austel must direct the carrier to supply the service to the public generally.[153] If Austel is not so satisfied, then it must decide not to direct the carrier so to supply the service.[154]

## E. Network Termination Point

*(i) The Present Boundary*

The concept of "network boundary", as delineated by the network termination point ("NTP"), is used in the Act to separate those areas which fall within the exclusive domain of a general carrier, from those areas where the supply and operation of connected customer equipment and networks is non-exclusive.[155] Drawing the line of the NTP is equivalent to drawing the line between monopoly and competition in telecommunications services and is thus potentially controversial because of its direct implications for consumers and competition.

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152 Sections 179 and 180 of the Act.

153 Sections 181(2) and 181(3) of the Act.

154 Section 181(5) of the Act.

155 Part 2, Division 2 of the Act.

At present, the NTP is the first telephone socket or, for multi-tenanted properties, the main distribution frame ("MDF").[156] Generally, a carrier is responsible for providing the lead-in cabling and trenching from the point of entry onto the customer's property to the NTP.

The NTP is a facilities, not a services, boundary.[157] Accordingly, although a carrier's exclusive rights end at the NTP, this fact does not diminish any obligations a carrier might have beyond that point (for example, universal service obligations).

*(ii) Proposals for Change*

In April 1991, the then Minister for Transport and Communications announced that, as from 1 July 1993, the NTP for new telephone services would be the property boundary, unless a customer were to contract with a licensed carrier to supply an alternative NTP within the property.[158] For connections already in existence at that date, the NTP would remain unchanged unless the customer elected, at the customer's own cost, to alter the location of the NTP. It was anticipated that, from that date, cabling work on any property beyond the network boundary would be open to competition.

In November 1992, pursuant to a request from the Minister to conduct an investigation into the implications of changing the NTP to the property boundary, Austel released a discussion paper.[159] That paper highlighted a number of difficulties in delineating the property boundary as the NTP.

The major implication of the NTP being drawn at the property boundary is that the customer would be responsible for all property connection and internal wiring installation and maintenance costs. Although customers would be free to arrange these services with a general carrier or any other licensed provider of cabling services, the actual cost impact of such a change is uncertain.[160]

Other substantive issues which arise from defining the network boundary by reference to the property boundary include:[161]

- the implications for sophisticated 'active services'[162] which may need to terminate beyond an MDF to be of practical and economic benefit to the customer;
- the security implications of a property boundary NTP (it being much easier to tap or vandalise a system at an external pit);
- the technical considerations, such as the detection of faults (the cost of fault repair and maintenance being dependent upon which side of the NTP the fault lies);

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156 Section 6 of the Act.

157 Explanatory Memorandum to the Telecommunications Bill 1991, p 10.

158 Media Release Minister for Transport and Communications, 17 April 1991.

159 Austel, *Austel Investigation into Network Termination Point/Network Boundary* ("NTP Discussion Paper"), AGPS (November 1992).

160 Such an arrangement also has implications for the universal service obligation (discussed above).

161 Note 159 *supra*, pp 6-9.

162 For example, ISDN NT1 (Integrated Services Digital Network, Network Termination Type 1).

- the ability of urban and small business customers, as compared with large multi-line customers, to negotiate acceptable terms for cabling/wiring work and maintenance in light of their (generally) inferior knowledge and power;
- the effect of changes to property boundaries (for example, after subdivision of land);
- the application of a property boundary to strata and company title developments; and
- the implications for fulfilment of the universal service obligations.

In July 1993, Austel released a draft report to the Minister[163] in which it recommended that, inter alia, the building line be the reference point for determining the NTP, rather than the property boundary.[164] According to Austel, the building line constitutes a "natural" NTP (in the case of residential and single and dual line services) and a practical solution in line with current practice (in the case of most commercial services and residential multi-tenanted buildings). The latter particularly so when combined with some customer flexibility to negotiate an alternative NTP in appropriate cases.

Austel also recommended that current practices in relation to the supply of network termination devices[165] continue, and that where a network termination device is appropriate, it be located at, or in close proximity to, the building line and be recognised as the NTP. Where a network termination device is not appropriate, then the building line should determine the network boundary. However, a customer would have the right to negotiate with a carrier a network boundary which was not at, or in close proximity to, the building line.

All cabling and equipment on the customer's side of the network boundary would be deemed customer cabling or customer equipment and be open to competitive installation, supply and maintenance. The supply of active service termination equipment ("ASTE")[166] would be open to competition.[167]

As yet, neither the Ministerial announcement made in April 1991, nor Austel's draft recommendations, have been put into effect.[168]

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163 Austel, *Network Termination Point/Network Boundary*, Draft report to the Minister for Communications (the "NTP Report"), AGPS (July 1993).

164 Refer, *ibid* pp 5-6, for Austel's recommendations.

165 Namely, carrier supply of single line residential network termination devices and building developer/owner supply of main distribution frames. A network termination device is, essentially, a fixed cable joining facility (the telephone socket and MDF are examples of such devices).

166 For example, network termination units (being the part of the network equipment that connects directly to the data terminal equipment) and NT1's used for Integrated Services Digital Network ("ISDN") services.

167 In order to facilitate such competition, carriers would be required to make available relevant information to allow the competitive supply and maintenance of ASTE compatible with their networks and persons other than the carriers supplying such equipment would be required to warrant its continued interoperability with the carriers' networks: note 163 *supra*, p 6.

168 A point to note is that any such change to the NTP would probably be effected by regulation, rather than by amendment of the Act: refer s 11 of the Act. Although this approach has certain advantages, such as flexibility in light of rapid changes in technology, it constitutes a large grant of power by Parliament to the Executive. Although legally effective, this approach does have significant planning implications for those involved in the industry.

*(iii) Comment*

The question of the location of the NTP has implications for a number of other difficult issues in this area, such as ownership of, and responsibility for, customer cabling. These however, are beyond present scope.

Suffice it to say that, whatever NTP is ultimately chosen, it needs to be not only "practical to administer and technically feasible",[169] but also needs to take into account issues beyond the mere competition agenda. For example, as the Communications Law Centre pointed out in its submission to Austel, "for many residential customers, potential efficiency and cost savings may be less important than certainty regarding where responsibility lies for the quality, reliability, maintenance and repair of the telephone service".[170]

## F. Resale of Telecommunications Capacity

It was announced in the Beazley Statement that:

> Lifting all restrictions on resale would encourage better utilisation of network capacity, allow a greater variety of service providers to compete, increase customer choice and facilitate the introduction of technological and service innovation; and eliminate the need for cumbersome and contentious legislation to define the difference between basic and value added services.[171]

As has been pointed out:

> There is always the danger in a closed market environment which has absolute barriers to entry that the licensed participants will not engage in strongly competitive behaviour. Resale provides greater market contestability and encourages more competitive behaviour.[172]

Accordingly, third party simple resale of public switched voice, domestically and/or internationally, is now permitted under the Act.

Austel has implemented a class licence system which permits the provision of a range of telecommunication services without the necessity to obtain an individual licence, provided that the supplier of such a service complies with the provisions of the class licence. The class licence approach is intended to:

- create a market environment which requires minimum intervention by Austel;
- not require Austel to make commercial judgments which would best be left to the market;
- allow the marketplace and technology to drive the growth and development of the service provision industry;
- provide adequate safeguards against discriminatory practices and the misuse of market power by the carriers;

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169 Note 159 *supra*, p 3.

170 Note 163 *supra*, p 12.

171 Beazley Statement, p 12.

172 Austel, *Resale*, Report to the Minister for Transport & Communications (the "Resale Report"), AGPS (December 1990), p 10.

- not artificially restrict service providers in the scope of their activities, thereby maximising market contestability; and
- safeguard the integrity of carrier networks.[173]

There are two types of resellers - switched and unswitched. Essentially, unswitched resellers do not invest in separate switching systems, acquire leased circuits nor establish any independent network facilities.[174] Rather, an unswitched reseller purchases a multi-location service from a carrier and signs up a number of users to share that service. Usually, the customers, taken individually, are unable to secure cost savings due to relatively small volume. However, where several such customers operate collectively via an unswitched reseller, which aggregates their traffic, such savings can be captured.[175]

By contrast, a switched reseller installs independent switching centres in strategic locations, linked by carrier-supplied leased lines so that, generally speaking, only the transmission element of the carrier network is resold.[176] This reduces the reseller's dependency on carrier provided facilities, but it also increases the costs of market entry, since there is now a separate infrastructure to install, operate and maintain.[177]

The Act obliges carriers, subject to certain exceptions, to connect eligible services[178] and, as has been discussed previously, carriers have an obligation, in relation to the supply of basic carriage services, not to discriminate against resellers or the customers of resellers.[179]

The two main class licences are the:

- Service Providers Class Licence ("SPCL"); and
- International Service Providers Class Licence ("ISPCL").[180]

*(i) Domestic Resale*

The SPCL allows any person to acquire telecommunications capacity from a general carrier, or, in defined circumstances, capacity derived from private infrastructure (for example, private radiocommunications links) and, in turn, use that capacity to supply certain domestic telecommunications services. The permitted services, referred to as "eligible services" are defined in the Act.[181]

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173 *Ibid*, p 28.

174 M McDonnell, "The Resale Revolution" (March 1993) *Australian Communications* 89 at 90.

175 In addition, in the United States, such resellers are often classified into two groups: "aggregators" and "rebillers". An "aggregator" does not have a separate billing system, and its customers are billed directly by the carrier. The "aggregator" then sends a separate bill to each site to claim a share of the customer savings. "Rebillers" however, receive a master bill from the carrier and then send out their own bills and provide their own customer service: *ibid*.

176 *Ibid*.

177 *Ibid*.

178 Section 234 of the Act.

179 Section 184 of the Act.

180 There is also a third class licence relating to the provision of Public Access Cordless Telephone Services ("PACTS").

181 Section 18 of the Act.

The SPCL sets out a number of conditions with which a supplier must comply.[182] Where the supplier of an eligible service breaches a condition of the SPCL, Austel may take action to declare that the service is an unlicensed service and to ensure that the service is no longer connected to a carrier's network or another supplier's facilities.[183]

*(ii) International Resale*

The regime of the ISPCL is similar to that of the SPCL. The ISPCL relates to the supply of "eligible international services".[184]

International resale in Australia is not based on the "reciprocity" principle of regulation which applies in certain countries generally considered to have liberalised telecommunications regulatory regimes.[185] That principle requires that resellers only operate where similar opportunities of resale exist at the foreign end of the resale arrangement. In some countries, international resale is prohibited entirely, and in yet other countries, international simple resale is permitted. Indeed, it was this high degree of liberalisation of the Australian international resale market which provided the impetus for Austel's international resale inquiry.

*(iii) International Resale Inquiry*

Paragraph (8) of the ISPCL provides that where a service is supplied between Australia and a place outside Australia, and is in the public interest, then that service may be interconnected with public switched telecommunications networks in Australia and a place outside Australia ("international double-ended interconnected services"). Both the Department of Communications and the Arts and Austel have stated that it is Government policy that international resale services are viewed as being in the public interest until or unless the contrary is shown. Thus, the practical implementation of the policy is the opposite of the express words to be found in the ISPCL - that is, such services are taken to be in the public interest, and regulatory intervention (for example, in the form of an Austel investigation), will occur only when it appears that an eligible international service is not, or will not be, in the public interest.

"Public interest" is not defined in the Act or the ISPCL. Austel, in its Guide to the ISPCL, states that where required, Austel will assess the public interest on a case by case basis, having regard to certain matters set out in the Act[186] and may

182 Refer, particularly, SPCL at [5].

183 SPCL at [9].

184 The definition of "eligible international service" is contained in ss 5 and 18 of the Act.

185 Particularly, the United States of America, Canada and the United Kingdom. Approximately half of Australia's international telecommunications traffic is with countries that have liberalised markets: Bureau of Transport and Communications Economics, *International Telecommunications: An Australian Perspective*, Report 82, AGPS (August 1993), p 19.

186 One of Austel's functions includes ensuring that the provisions of the Act are carried out with due regard to the public interest, and to this end the general objects of the Act do provide some guidance on matters to be taken into account by Austel in determining the public interest. The more pertinent objects are:

also include consideration of the advantages and disadvantages of the service to consumers, the economy and competition.

Following a submission from Telstra, Austel instigated an inquiry into the Australian international resale regime - in particular, whether the provision of international double-ended interconnected services was in the public interest. According to Telstra, certain eligible international services were in conflict with the policy goals set out in clause 4 of the International (Eligible International Services) Direction (No 1) of 1991, in particular, in relation to international service

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1. enabling all sectors of the Australian telecommunications industry to participate effectively in Australian and overseas telecommunications markets on a commercial basis and making Australia more attractive as an international telecommunications centre;
2. promoting the development of other sectors of the Australian economy through the commercial supply of a full range of modern telecommunication services at the lowest possible prices;
3. creating a regulatory environment for the supply of telecommunication services which promotes competition and fair and efficient market conduct;
4. promoting the development of Australia's telecommunications capabilities, industries and skills for use in Australia and overseas; and
5. ensuring that all parts of the community benefit from lower prices for telecommunications facilities and services and from the future development of telecommunications networks.

The objects of Part 10 of the Act relating to the "Supply of Telecommunications Services Under Class Licences" also provide guidance on public interest issues:

1. to ensure that eligible services, and the facilities used in supplying them, meet technical and operational standards determined by Austel for the purpose of:
   (a) maintaining the integrity and efficiency of telecommunications networks operated by carriers; and
   (b) maintaining at international standards the standards of eligible services supplied in Australia;
2. to ensure that telecommunications networks are not used in an unlawful way or for unlawful purposes in connection with the supply of eligible services;
3. to promote and safeguard a fair and efficient market in the supply of telecommunications services and to ensure that the supply of higher level services is open to full competition;
4. to provide a means of regulating the activities of persons who supply eligible international services, in order to prevent the misuse of market power by persons who operate telecommunications networks outside Australia for, or in relation to, the supply of such services;
5. to provide a means of regulating the supply of eligible services (other than public mobile telecommunications services) by means of facilities that include a radcom facility -
   (a) that is owned or operated by a person other than a general carrier; and
   (b) is connected to a network operated by a general carrier;
6. to provide a means of regulating the supply of eligible services by means of a network that -
   (a) is owned or operated by a person other than a general carrier;
   (b) is also used, is intended to be also used, or can also be used, to supply telecommunications services between places that are all in the same area because of subsection 12(2) or (3); and
   (c) is interconnected to a network operated by a general carrier;
7. to provide a means of regulating the supply of eligible services by means of -
   (a) a reserved line link between a place within Australia and a place outside Australia; or
   (b) facilities including such a line link.

The purpose of regulating the supply of eligible services as mentioned in [5], [6] or [7] is to prevent undue erosion of the practical value of the general carriers' rights.

The Explanatory Statement to the Telecommunications (Eligible International Services) Direction (No 1) of 1991 states:

> AUSTEL is also directed ... to have regard to the market access conditions applying at the foreign end when considering what degree of ongoing regulatory oversight it shall conduct. ... the more restrictive the foreign market access conditions, the more likely Australian carriers and service providers could be disadvantaged, hence the closer the oversight AUSTEL should conduct.

providers misusing the offshore regulatory status of foreign carriers and participating in activities that substantially lessened competition. Telstra alleged that these activities unduly eroded the practical value of the carriers' rights in terms of clause 4(e) of the International (Eligible International Services) Direction (No 1) of 1991.

Telstra claimed that the lack of reciprocity in the regulatory arrangements in other countries (for example, Singapore and the United Kingdom) may provide certain international resellers (for example, those affiliated with a carrier in those countries) with an unfair advantage in terms of the ability to acquire capacity. Telstra also claimed that the potential existed for foreign carriers, or international service providers operating in Australia that were related to foreign carriers, to gain preferential access to overseas markets, thus unduly eroding the practical value of the carriers' rights.

Another of Telstra's concerns was that overseas carriers could avoid liability to Australian general carriers for termination payments under the accounting rate arrangements (discussed further below) by diverting Australian-bound traffic from the public switched telecommunications network to their affiliated international reseller in Australia. Telstra argued that this increased the effective cost to Australian consumers of international services, since it amounted to an increase in the termination fees imposed on traffic from Australia and adversely affected the balance of payments between Australia and the relevant country.[187] At the same time, it entrenched the foreign carrier's incentive to maintain artificially high accounting rates.

On 15 December 1993, Austel released its preliminary findings and on 28 March 1994, it released its final findings. Austel concluded that the supply by international service providers of double-ended interconnected services had not, at that point, substantially lessened competition or unduly eroded the practical value of the carriers' rights. However, Austel also indicated that a misuse of market power or offshore regulatory status might lead to a substantial lessening of competition (and undue erosion of the practical value of the carriers' rights) where:

- a service provider receives terms and conditions of access to a foreign carrier that are more beneficial than those offered to Australian carriers (this may occur, for example, where a foreign carrier has a special relationship with its subsidiary or affiliate); and
- Australian carriers do not have an equal opportunity to negotiate such terms and conditions.

In such cases, Austel might use its powers under paragraph 10(k) of the ISPCL to request whatever information it considered necessary from both service providers and carriers in order to determine whether services were being provided in the public interest.

Austel rejected the view that the relevant services be subject to any form of pre-enrolment vetting or that service providers should provide detailed information

187 Since end-payments to Australia declined, while out-payments from Australia stayed unchanged for the same volume of two-way traffic.

concerning their services, as being inconsistent with Government policy, as expressed in the Telecommunications (Eligible International Services) Direction (No 1) of 1991. However, it proposed to amend the Guide to the ISPCL in order to outline circumstances in which Austel considers the public interest might not be served by the supply of double-ended interconnected services. In addition, Austel considered it appropriate that service providers notify Austel once they have firm plans to provide double-ended interconnected services, in order that Austel might monitor the market and ensure that the Government's policy objectives continued to be met.

## V. DOMINANCE IN A TELECOMMUNICATIONS MARKET

As we have seen, the Act creates a number of significant restrictions on a carrier which is in a position to dominate a particular market.[188] The concept of "dominance in a market" is thus clearly fundamental to the regulation of competition in the Australian telecommunications market.

The Act provides that a carrier is taken to be in a position to dominate a market if, and only if, the carrier is taken, for the purposes of s 50 of the *Trade Practices Act* (as in force immediately before the commencement of the *Trade Practices Legislation Amendment Act* 1992 (Cth)),[189] to be in a position to dominate that market, or would be so taken if the market were a market within the meaning of that section.[190]

Prior to the enactment of the *Trade Practices Legislation Amendment Act* 1992 (Cth), s 50(3)(b) of the *Trade Practices Act* provided that dominance of a market may be either as a supplier or as an acquirer of the goods or services in that market. In addition, under s 50(2), the market power of related and associated corporations could be aggregated for the purpose of determining whether a corporation was in a position to dominate a market.

This article will now consider in more detail, the questions of "market" and "dominance" in the telecommunications context.

### A. The Question of "Market" Generally

The threshold concept of "market" and its identification in a given case is *crucial* to the question of whether a carrier dominates a particular market, and, in turn, will help determine when the measures in place to protect and foster sustainable network competition (discussed above) will cease to apply. The

188 In particular, refer ss 181, 183, 187, 190(10), 195 and 197 of the Act. See also clauses 12(3) and 14 of the Telecommunications (Interconnection and Related Charging Principles) Determination (No 1) of 1991.

189 That Act, which commenced on 21 January 1993, reduced the threshold in respect of prohibited acquisitions from those that were likely to result in dominance of a market, to those which were likely to have the effect of substantially lessening competition in a relevant market.

190 Sections 5 and 28 of the Act. For the sake of expediency, references to s 50 of the *Trade Practices Act* will be taken to mean references to s 50 of that Act as it was in force immediately before the commencement of the *Trade Practices Legislation Amendment Act* 1992 (Cth).

narrower the market definition, the more likely it is that a carrier will be found to be dominant in that market, and vice versa.

The Act states that "market" has the same meaning as in the *Trade Practices Act*.[191] What then is the meaning of "market" in that Act?

*(i) Meaning of "Market" in the Trade Practices Act*

Section 4E of the *Trade Practices Act* defines "market" for the purposes of that Act as a market in Australia, and, when used in relation to any goods or services, includes a market for those goods or services and substitutable goods or services. Section 50(6) of the *Trade Practices Act* defines the relevant market, for the purposes of s 50 of that Act, as a "substantial" market for goods or services in Australia, in a State or Territory.[192]

It is arguable that the extent to which s 50(6) of the *Trade Practices Act* is intended to affect the delineation of the relevant market by virtue of s 28 of the Act, is questionable.[193] The words "or would be so taken if the market were a market within the meaning of that section", found in s 28 of the Act, might operate to exclude the application of s 50(6) of the *Trade Practices Act*, so that while the relevant market must still be within Australia (s 4(E) of the *Trade Practices Act*), it need not be a "substantial" market for a particular kind of basic carriage service or a particular kind of telecommunications service.[194] This view accords with that apparently taken by the Australian Government Solicitor.[195]

The meaning of s 50(3)(a) (the predecessor of s 50(6)) has been interpreted by one author as saying that:

> (t)he market must be 'substantial' in a State of Australia,[196] and if, for example, one is seeking to acquire a corporation whose main activities are confined to but spread across a particular State, say, New South Wales, it should not now undo the acquisition merely because the merger will remove a significant degree of competitive conduct in, say, Newcastle. In other words the matter should be looked at according to the spread of activity of the merged enterprise across the whole State, and not merely, or necessarily, one part of it.[197]

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191 Section 5 of the Act.

192 To the best of the writer's knowledge, neither s 50(6) nor its predecessor, s 50(3)(a), have been judicially considered. The meaning of "substantial" has been restricted in the cases to a consideration of its meaning in connection with an effect on competition or a particular degree of market power - refer, for example, *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 62 FLR 437 at 444, per Lockhhart J; *Tillmanns Butcheries Pty Ltd v The Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 at 348, per Deane J and at 338, per Bowen CJ.

193 CC Hodgekiss and NW Young, "Regulation of Restrictive Trade Practices in the Australian Telecommunications Industry" (July/August 1992) *International Business Lawyer* 365 at 370.

194 The Explanatory Memorandum to the Act provides no guidance on this point.

195 Austel, *Market Dominance Guidelines - Austel's Approach to Determining Issues of Market Dominance in Telecommunications*, Discussion Paper, AGPS (May 1993) pp 7-8.

196 The writer's comments predated the 1986 amendments concerning a substantial market in a Territory.

197 WR McComas, *Monopolization and Mergers: What can be done?*, Business Law Education Centre (No 7, 1977) p 35.

(a) Identifying the Relevant Market

Sections 4E and 50(6) of the *Trade Practices Act* are of limited assistance in defining the relevant market in a particular case. The development of relevant principles has accordingly been the task of the courts.

The now classic Australian statement of the concept of "market" was formulated by the Trade Practices Tribunal (the "Tribunal") in *Re Queensland Co-Operative Milling Association Ltd/Defiance Holdings Ltd.*[198] The Tribunal stated:

> A market is the area of close competition between firms ... Within the bounds of a market there is substitution - substitution between one product and another, and between one source of supply and another, in response to changing prices. *So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.* ... Whether such substitution is feasible or likely depends ultimately on customer attitudes, technology, distance and cost and price incentives. It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply? (emphasis added)[199]

A market may exist if there are potential buyers for a product, notwithstanding that there is no supplier of, nor trade in, those goods at a given time; it is sufficient that there be a product for exchange.[200] Similarly a market will continue to exist even though dealings in it are temporarily dormant or suspended.[201] It can be seen then, that the areas of both actual and potential competition will be relevant.[202]

Although defining the relevant market is invariably a complex question, it is useful to recall briefly some of the more specific factors which have emerged in the case law as being relevant to the issue - namely, substitutability, product market, geographic market, functional market and submarkets.[203]

In determining the relevant market, a detailed evaluation will be required,[204] and the economic meaning of competition[205] must be applied in a practical way to

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198 (1976) 1 ATPR ¶40-012 (the *QCMA* case).

199 *Ibid* at 17,247.

200 *Queensland Wire Industries Pty Ltd v BHP Ltd* (1989) 167 CLR 177 (the *Queensland Wire* case).

201 *Ibid.*

202 *Trade Practices Commission v TNT Management Pty Ltd* (1985) 6 FCR 1 (the *TNT* case); *Re Howard Smith Industries Pty Ltd* (1977) 1 ATPR ¶40-023 (the *Howard Smith* case); *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 2)* (1979) 40 FLR 83 (the *Nicholas Enterprises* case).

203 Due to spatial limitations, this article will focus more particularly on the determinations as to dominance in the market for public mobile telecommunications services which have been handed down (as these are of greater, practical interest in the present context). Accordingly, the following is intended to act merely as general background for those unfamiliar with Australian trade practices law. Needless to say, elegances of argument and interpretation will undoubtedly be sacrificed to the altar of brevity as a result.

204 The *QCMA* case, note 198 *supra.*

205 The economic meaning of competition refers to the capacity and ability of the market to adopt new techniques of production and distribution; to respond to variations in the needs and requirements of buyers; to avoid

accommodate the concern of the *Trade Practices Act* with business and commerce.[206] The best evidence of the dimensions of the relevant market may be the behaviour of those involved[207] and, although economic evidence is helpful, it is ultimately the court's decision as to the relevant market.[208]

*Substitutability* is relevant to all aspects of market definition and should be considered from the perspectives of both buyers and sellers.[209] Temporal considerations are highly relevant to substitutability[210] (a longer time frame generally being more appropriate, though this varies with the nature of the product). The existence of marginal overlapping and substitutability does not, of itself, negative the existence of separate markets; it is a question of degree at what point substitutability means products are in the same market.[211] The substitutability inquiry should comprehend the maximum range of business activities and the widest geographic area within which, given sufficient economic incentive, there is demand and/or supply substitutability.[212]

In identifying the appropriate *product market*, it is relevant to inquire whether there is a separate brand name market in the product at issue. Whilst the existence of such a market is unlikely,[213] it is not impossible.[214] The test is one of substitutability - is the particular product, or brand of products, so distinctive that no other product or brand is seen by consumers as a possible substitute?[215]

The *geographic market* must correspond to the commercial realities of the market.[216] For example, the nature of the product itself may impact greatly on market definition.[217] The existence of some sales outside the limits of the hypothetical market does not necessarily negative the existence of a separate market; much depends on the extent of the exceptions.[218] Similarly, the fact that two series of prices for different products respond in a similar way to a particular external stimulus does not necessarily mean that the products are in the same market (price influences and incentives are not as important to the definition of market as may have been thought).[219]

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excessive profits or selling costs; and to distribute goods and services efficiently: *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* (1982) 66 FLR 120 (the *Hecar* case).

206 The *Hecar* case, *ibid.*

207 *Mark Lyons Pty Ltd v Bursill Sportsgear Pty Ltd* (1987) 9 ATPR ¶40-809 (the *Mark Lyons* case).

208 The *TNT* case, note 202 *supra*; *Trade Practices Commission v Australian Meat Holdings* (1988) 10 ATPR ¶40-876 (the *AMH* case).

209 The *TNT* case, note 202 *supra* ; the *Queensland Wire* case, note 200 *supra*.

210 *In re Tooth & Co Ltd* (1978) 2 ATPR ¶40-065, ¶40-084; (1979) 2 ATPR ¶40-127 (the *Tooth* case).

211 The *AMH* case, note 208 *supra*.

212 The *Tooth* case, note 210 *supra*.

213 The *Mark Lyons* case, 207 *supra*.

214 *Top Performance Motors Pty Ltd v Ira Berk (Qld) Pty Ltd* (1975) 1 ATPR ¶40-004 (the *Top Performance* case); *United Brands Co v The Commission of the European Communities* (1978) CMLR 429 (the *United Brands* case).

215 The *Marks Lyons* case, note 207 *supra*.

216 The *Howard Smith* case, note 202 *supra*; the *AMH* case, note 208 *supra*.

217 The *AMH* case, note 208 *supra*.

218 *Ibid.*

219 *Ibid.*

In industries where *functional levels* are distinct, the levels on which parties operate must be considered when determining the relevant market. As a practical matter, the functional level is usually treated as part of the product market.

The identification of sub-markets assists in delineating the relevant market.[220] It has been said that:

> (t)he distinction between markets and sub-markets can be merely one of degree. Sub-markets are the more narrowly defined, typically registering some discontinuity in substitution possibilities. Where the defining feature of a market is the existence of close substitutes (whether in demand or supply), the defining feature of a sub-market is the existence of still closer and more immediate substitutes.[221]

Certain practical indicia are helpful in identifying a sub-market - industry or public recognition of the sub-market as a separate entity; the product's peculiar characteristics; the existence of unique production facilities; distinct prices and sensitivity to price changes; specialised vendors; and geographic areas.

*(ii) Meaning of "Market" in the Act*

As already discussed, the Act makes trade practices case law relevant for the purposes of defining markets in relation to the issue of dominance. The Act, however, does provide limited guidance, in relation to market analysis, in two respects. First, the provisions of the Act touching upon market dominance do refer, depending on the context, either to:

- a market for "a particular kind of telecommunications service";[222] or
- a market for "a particular kind of basic carriage service".[223]

Secondly, the Act provides[224] that a telecommunications service for carrying communications between one geographical area and another may be taken for a particular purpose[225] to be of a kind different from:

- a telecommunications service for carrying communications between one of those areas and a third geographical area; or
- a telecommunications service for carrying communications between a third geographical area and a fourth,

even if two or more of those areas overlap and even if the services are alike in other respects. However, the Act also provides[226] that the above does not limit the matters that may be considered in determining, for a particular purpose, whether a

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220 The *TNT* case, note 202 *supra*.

221 The *QCMA* case, note 198 *supra* at 191; cited with approval in the *Queensland Wire* case, note 200 *supra* at 199, per Dawson J.

222 Part 9, Division 4 of the Act.

223 Part 9, Division 5 of the Act.

224 Section 27(1) of the Act.

225 The meaning of "a particular purpose" is neither defined nor specified, but would presumably include the anti-discrimination and tariffing provisions of the Act. It seems clear, given the broad language of s 27 of the Act, that a particular purpose could include that of determining whether a carrier is in a position to dominate a particular market.

226 Section 27(2) of the Act.

telecommunications service is of the same kind as another telecommunications service.

This is a permissive provision only. Accordingly, notwithstanding that a telecommunications service in one geographic area may be treated as of a different kind from a telecommunications service in another geographic area for a particular purpose, it may nonetheless be in the same market by reference to trade practices case law on market definition.[227]

It is to be noted, as a general matter, that the market phraseology so employed precludes reference to other, non-telecommunications based means of providing information or communications (for example, MDS technology[228]).[229] This decreases the range of substitution possibilities and narrows the scope of any relevant market from the outset. This is hardly surprising in view of the fact that the market dominance provisions in the Act are directed towards promoting and sustaining network competition. Accordingly, it is the markets comprising the networks which are relevant in the particular circumstances of the inquiry. Of course, there will always be scope to consider non-telecommunications based means of providing information or communications when examining carrier conduct under general competition law.

*(iii) Bureau of Transport and Communications Economics' View of "Market"*

In early 1993, the Bureau of Transport and Communications Economics[230] released a working paper which considered the question of "market".[231]

The BTCE concluded, unremarkably, that the boundaries of relevant markets in Australian telecommunications may be affected by the purpose for which the market definition is being undertaken. Different definitions of the market may therefore be appropriate under different provisions of the Act. As well, market boundaries may change over time in response to developments in technology, costs of equipment and regulatory arrangements.

Noting that the term "market" is expressed in the Act to have the same meaning as in the *Trade Practices Act*, the BTCE's conclusion was that substitutability (an

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227 Note 193 *supra* at 371.

228 An MDS system is a system which transmits radiocommunications on a frequency or frequencies within the frequency band from 2076 Megahertz up to and including 2111 Megahertz or the frequency band from 2300 Megahertz up to and including 2400 Megahertz.

229 An example of this can be found in relation to the concept of "a market for a particular kind of basic carriage service". This is because the Act defines a "basic carriage service" as a telecommunications service that consists only of functions each of which is involved in:

- establishing, maintaining or terminating a connection across the telecommunications network by means of which the service is supplied;
- modifying a connection after it has been so established; or
- carrying a communication across the network,

and which is supplied by means of at least one reserved line link, facilities including at least one reserved line link or by the use of satellite-based facilities: s 174 of the Act.

230 (The "BTCE"). The BTCE is a centre for applied economic research in the Department of Communications and the Arts.

231 Note 89 *supra*. The 134-page working paper gave detailed consideration to the related concepts of "market" and "dominance" as they affect the telecommunications industry in particular.

important criterion in trade practices "market" law) was therefore the appropriate basis on which to identify markets in Australian telecommunications. Although it noted that supply-side factors would be important, the BTCE took the view that the primary emphasis would generally be placed on the demand side.

The BTCE's view was that Australian telecommunications markets may need to be more narrowly defined in terms of the point-to-point communication. That is, the markets may need to be separately identified as narrower markets for calls from place A to place B (that is, country or city 'pairs'), rather than, say, a broader product market of international or domestic long distance services. The effect of defining a telecommunications market in this way would be that, when Optus obtained a reasonable market share on a particular route, Telstra would no longer be dominant on that route and the competition controls would no longer apply to it. It would also have the effect of making it more likely that competition controls would fall away more quickly (a domino effect), as it would be easier to argue loss of dominance on a city/country pair basis, than on the overall international or domestic long distance markets.

The BTCE's conclusion is arguably a sensible one in terms of demand substitutability - a person demanding a call between Sydney and London is hardly likely to find a call between Sydney and Frankfurt to be substitutable. Nonetheless, the conclusion was criticised by some sectors of the industry (notably Optus) as not reflecting the "commercial reality" that people choose a carrier on the basis of its price for a particular type of service (that is, long distance or international calls), rather than on a call-by-call basis.[232]

It may be, given the recent phone ballots,[233] in which telephone subscribers "preselected" their preferred long distance carrier, that this criticism has some basis. Nonetheless, since the facility exists to override that preselection and select a particular carrier on a call-by-call basis by dialling a 4-digit prefix, the cogency of the preselection argument is diminished. This is also the case when one considers that PBX[234] facilities such as Automatic Route Selection (ARS)/Least Cost Routing (LCR) (which allow a PBX processor to automatically route outgoing calls on an optimised, least-cost basis) are readily, commercially available. Of course, the extent to which subscribers exhibit this type of churn behaviour is not statistically known (at least publicly).

The BTCE's analysis indicated to it that there are separate markets for domestic and international telecommunications services in Australia and that individual country-pairs should also be treated as separate markets. The BTCE found some

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232 P Leonard, "Dominance and Telephones : The Coming Battle" (Feb 1993) *Australian Communications* 49 at 50.

233 At the time of writing, phone ballots had been conducted in Sydney, Melbourne, Canberra, Geelong and Mornington. Phone ballots had begun in Penrith on 12 May 1994 and in Perth on 1 June 1994. Adelaide had been nominated for a phone ballot scheduled to commence on 28 June 1994.

234 "Private Branch Exchange" - a telephone switch located on a customer's premises that primarily establishes voice-grade circuits, over tie-lines between individual users and the switched telephone network. Typically, the PBX also provides switching within a customer premises' local area and usually offers numerous other enhanced features, such as call-detail recording.

analytical support for separate local and trunk markets in Australia, but continued debate about the appropriateness of individual city-pair markets.

The BTCE concluded that product markets may differ for domestic and international telecommunications services. According to its analysis, there are separate markets for fixed and mobile services. It may also be that a distinction between voice services and one or more categories of non-voice services would be appropriate.

*(iv) Austel's View of "Market"*

In an effort to further enhance industry understanding of the administration of the Act, Austel released a discussion paper in March 1993 entitled "Market Dominance Guidelines - Austel's Approach to Determining Issues of Market Dominance in Telecommunications".[235]

The approach taken by Austel to defining "market" closely reflected that already taken in the area of trade practices law, including the identification of both demand and supply substitutability as important criteria in defining "market". Austel also expressly stated that it would draw upon United States' experience to assist in determining demand and supply substitutes.[236]

In terms of demand substitutes, Austel proposed[237] to adopt the United States' approach of narrowly defining the product and asking what would happen if the producer of the product was a hypothetical monopolist and imposed a "small but significant and non-transitory increase in price", while the terms of sale of all other products remained constant.[238] Austel stated that, if in response to such a hypothetical price increase there would be consumer migration to another service, then it considered that the other service would be included in the "market". The "small but significant and non-transitory increase in price" would be 5 per cent, although deviations from that benchmark might be adopted in certain circumstances.

In identifying potential suppliers for the purposes of supply substitution, Austel aligned with the approach taken in the United States that "supply responses likely to occur after 12 months would not be sufficiently timely for the firms to be considered potential suppliers when delineating the market for many individual services".[239] It would, however, "consider supply responses planned to occur after twelve months where a major infrastructure development is required before the service is available, provided that the potential supplier meets the evidence criteria".[240]

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235 Austel, *Market Dominance Guidelines - Austel's Approach to Determining Issues of Market Dominance in Telecommunications* (the "Market Dominance Guidelines"), AGPS (March 1993).

236 *Ibid*, p 31.

237 *Ibid*.

238 US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, (April 1992).

239 Note 235 *supra*, pp 35-6.

240 *Ibid*, p 36.

## B. The Concept of Dominance

As already indicated, s 28 of the Act defines "dominance" as having a meaning "affected by" s 50 of the *Trade Practices Act*. Although the Act makes explicit reference to the dominance concept as it was in the *Trade Practices Act*, dominance was never defined in that Act, but left to be interpreted by the courts. It may be possible to argue that, by virtue of the use of the phrase "affected by", reference may be had in determining dominance in the telecommunications context, to factors additional to those traditionally considered in the trade practices context.

The words "in a position to dominate", as used in both ss 28 and 50, mean that it is not necessary that the corporation actually dominate the relevant market. The relevant examination is of the corporation's potential to dominate.[241] The words "in a position to" should be given due weight in the context of the meaning given by the courts to the word "dominate".

### *(i) General Trade Practices Case Law*

A corporation will be in a position to dominate a market if it is in a position to exert a commanding influence on that market.[242] A dominant firm has a high degree of market power.[243]

The Trade Practices Commission (the "TPC") has stated:

> (t)he concept of 'dominance' is of some complexity. A number of factors will need to be taken into account (and weighted appropriately) to determine its presence but in the final analysis a major determinant will be the extent to which the firm concerned is able to conduct its affairs in the market independently of its competitors, its suppliers and its customers. ...
>
> The assessment ..... involves both qualitative and quantitative considerations ...
>
> It is frequently put to the Commission that in the context of s 50, the ability of a firm to dominate a market is to be equated to its possession of discretionary market power in the sense that it is virtually absolute or is not constrained to any significant extent. The Commission does not accept that the test should be so high; rather does it believe that discretionary market power of that order is possessed only by firms having virtual monopoly power, ie those able to control a market.
>
> In the context of the *Trade Practices Act*, power to dominate, as opposed to control or monopolise, a market is in the opinion of the Commission at a much lower level.[244]

It has been said that:

> ... the word 'dominate' as used in s 50 of the Act cannot be given any special meaning by reason of common usage in the literature of economics. The word

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241 *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305 (the *Ansett* case).

242 *Trade Practices Commission v Arnotts Ltd* (1990) 12 ATPR ¶41-061 (the *Arnotts* case).

243 *Ibid.*

244 Trade Practices Commission, *Merger Guidelines*, (1986). Although the Commission has announced an enforcement policy which supersedes the merger guidelines (see "Objectives, priorities and work program for 1988-89", pp 4-5), it has endorsed the approach to 'dominance' which was contained there.

> 'dominate' is to be construed as something less than 'control'. The word is to be construed in its ordinary sense of having commanding influence on ...[245]

and that:

> (a)n enterprise will be in a position to dominate a market when there is a probability that the other enterprise or enterprises in the market will act in a way calculated not to affect adversely the dominant concern's short-term interests. Dominance, unlike control, is not primarily concerned with the formal relationship between entities but rather with their conduct towards each other within a particular market environment. If the size or strength of a particular entity is such that, in practice, other entities are unable or unwilling to compete with it in a particular market, that entity is dominant in that market. The dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.[246]

The following factors have been laid down as being of assistance (though not determinative), in assessing whether a corporation is in a position to dominate a particular market:[247]

1. identification of the corporations operating in the market and the degree of market concentration (that is, market share);
2. the capacity of the relevant corporation to determine prices for its services without being consistently inhibited in its determination by other operators in the market;[248]
3. the height of barriers to entry into the market;[249]
4. the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion; and
5. the character of corporate relationships and the extent of corporate integration among competitors in the market.

These factors do not purport to be criteria of universal application,[250] but rather may be of differing significance and weight according to the facts of the particular situation. The relevant factors may vary from industry to industry.[251]

Barriers to entry ((3) above) are often cited as an important criterion in the dominance inquiry and are of particular relevance in the telecommunications context. Such barriers:

> may arise from a variety of sources, including the following:
>
> 1. Blocked access: control of the supply of essential raw materials by established firms, distribution channels or other elements in the market, making new entry either impossible or too costly.

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245 The *Ansett* case, note 241 *supra* at 325, per Northrop J.

246 The *Arnotts* case, note 242 *supra* at 51,048, per Beaumont J.

247 The *Ansett* case, note 241 *supra* at 326, per Northrop J.

248 Note though, that profitability is not of real assistance in determining dominance: the *Ansett* case, *ibid.*

249 The Court in the *QCMA* case identified this as a particularly important consideration.

250 The *AMH* case, note 208 *supra*, per Wilcox J.

251 The *Ansett* case, note 241 *supra*.

2. Capital requirements for a new market entrant: It is necessary to remember, however, that there is a distinction between costs of entry and barriers to entry. Not all costs of entry represent a barrier. Critical factors are the extent of the predicted costs and the likely return.
3. Economies of scale: the scale of activities of existing market participants may be such as to lower their unit costs to a point where a newcomer could not compete, except at a loss.
4. Product differentiation: a long established firm may have the benefit of accumulated goodwill which a new entrant can only counteract by bearing higher promotional costs or suffering lower selling prices than the existing firms. ...
5. Legal restrictions: such restrictions may take the form of a statutory monopoly on the activity itself - for example, a broadcasting licence - or restrictions on access to commercially advantageous material - for example, by legislation dealing with patents, trade marks, copyright, etc.[252]

The existence of vertical integration may also evidence barriers to entry,[253] and any barriers to exit will be equally relevant. In US case law, a substantial market share coupled with the presence of exclusionary practices is indicative of monopoly power. These "exclusionary practices" often indirectly foreclose market entry and, therefore, are linked to the "barriers to entry" element.[254]

### *(ii) Bureau of Transport and Communications Economics' View of "Dominance"*

(a) Dominance Generally

In the BTCE Dominance Paper, the BTCE stated that, in telecommunications, the area of concern is the *loss* of a dominant position, whereas the *Trade Practices Act* focuses on the *achievement* or *strengthening* of a position of dominance, a difference which could affect the approach to be taken to assessing dominance in telecommunications.[255]

Substantially reflective of trade practices law, the BTCE identified two basic principles indicative of dominance, namely the ability to:

1. act largely independently of competitors, suppliers and customers; and
2. prevent effective competition (the key concepts in effective competition including independent rivalry and the absence of significant market power),[256]

and five broad factors relevant to assessing dominance and the effectiveness of competition:

1. the degree of market concentration;[257]

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252 The *Arnotts* case, note 242 *supra* at 51,790.

253 The *United Brands* case, note 214 *supra*.

254 D Healey, *Australian Trade Practices Law*, CCH Australia Limited (1988) at [745].

255 Note 89 *supra*, pp, xii-xiii.

256 The main measures of market power are the Lerner Index, the stand-alone cost approach, revenue-variable cost ratios, the Harberger method, the capital asset pricing model, the Rothschild Index and econometric models: *ibid*, pp 122-6.

257 Measured by, for example, concentration ratios or the Herfindahl-Hirschman Index: *ibid*, pp 121-2.

2. the capacity of a firm to determine its prices and engage in other conduct without being consistently inhibited by other firms (including the impact of the regulatory regime and any anti-competitive arrangements between firms);
3. the height of barriers to entry (including regulatory barriers, economies of scale, capital costs and limited access to essential facilities);
4. the extent of product differentiation and sales promotion; and
5. the character of corporate relationships and the extent of corporate integration.[258]

The BTCE noted that market share may provide a useful indication of whether a firm is in a dominant position,[259] but that its usefulness as an indicator is limited by such things as the impact of the market definition difficulties.[260]

(b) Dominance in Telecommunications

Some of the major factors identified in overseas studies of dominance and competition in telecommunications markets were:

- market shares;
- barriers to entry, particularly restricted access (or denial of access) to essential facilities;
- the ability of firms to set prices or engage in other conduct independently of other firms in the market; and
- regulatory constraints on the ability of firms to deny access to facilities or set prices.[261]

Other factors that have been considered overseas include: the buying power of customers; the relative resources and costs of individual firms; network size; operating relationships with overseas carriers; actual prices relative to maximum price cap levels; and the availability of radiofrequency spectrum rights.[262]

However, in the BTCE's view, there were specific aspects of the Australian market which would warrant attention and which might affect the analysis, including:

- terms and conditions of access to essential facilities, including the impact of regulatory arrangements; and
- the ability of a carrier to engage in practices such as cross-subsidisation or predatory pricing, including the impact of the regulatory framework (for example, accounting separation, price caps and unbundling arrangements).[263]

With respect, the BTCE's view would appear to be fallacious, assuming that the policy makers have correctly identified and structured the controls in the Act described above directed towards network competition. This is because those

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258 *Ibid*, pp, 61-2.

259 It is interesting to note in this context that the BTCE has concluded that viable competition in the international telecommunications market can be established at relatively low levels of market share: note 185 *supra*, p 77.

260 Note 89 *supra*, p 62.

261 *Ibid*, p 72.

262 *Ibid*, p 93.

263 *Ibid*, pp 61-2.

controls are theoretically designed to ensure that the current regulated market mimics a market of "perfect" competition. Accordingly, the analysis of market dominance should be undertaken without specific reference to the regulatory arrangements (with the possible exception of barriers to entry such as the requirement to be licensed as a general or mobile carrier). The impact of licensing as a barrier to entry is diminished however, in view of the resale regime presently in place.

*(iii) Austel's View of "Dominance"*

Austel, in its Market Dominance Guidelines, took an highly conventional approach to "dominance", in that it substantially followed traditional trade practices learning. There is scope to criticise certain aspects of the paper, but of particular continued interest is that the paper set out the weight Austel would give to particular factors in determining "dominance".

Although generally accepting the five factors set down by Northrop J in the *Ansett* case (discussed above), Austel also stated that the criteria may not be of universal application and that certain criteria may not be applied, or may be modified, depending on the particular circumstances of each investigation.[264] It then identified and weighted each criteria, however, by way of caveat, stated that the actual weight accorded will be dependent upon the particular circumstances, and Austel's approach to the application and use of these criteria would evolve and develop over time.[265]

(a) Market Shares of Firms

Austel identified the following indicators of market share: share of units sold in the market place; share of total market revenue; share based upon available capacity; and static or dynamic market share. Austel planned to give a high weighting to market share data and, in particular, a greater weighting to market share based on demand, rather than capacity.

The report identified various considerations against each indicator, but went on to acknowledge that the key limitation of market share is its inability, in a regulated market, to demonstrate the underlying behaviour or competitive conduct of carriers. Market share information cannot take account of some of the unique features of the present Australian telecommunications market, for example:

- the market only recently being opened to competition;
- the new carrier being required to engage in substantial capital investment over a relatively short period of time;
- the tendency for there to be delays between the new carrier entering the market and offering of a wide range of services; and
- the uncertain future regulatory environment post-1997.

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264 Note 235 *supra*, p 38.
265 *Ibid*, p 39.

(b) Height of Barriers to Entry

Austel identified a number of potential barriers to entry that would be considered, including scale economy and scope economy barriers; absolute cost barriers; and strategic barriers.

Austel determined that it would give a medium weighting to this criterion because it believed that the regulatory framework in telecommunications specifically addresses many of the issues that potentially create barriers to market entry or disadvantage new entrants. However, as Austel recognised, the extent to which the regulatory framework is successful in this aim needs to be factored.

(c) Other Criteria

Other relevant criteria highlighted by the report were:

- *the power to act independently*: Generally, Austel would give a higher weighting to evidence relating to a carrier's ability to determine prices independently. One of the factors that Austel would consider is the impact of regulatory factors such as the price control arrangements;
- *product differentiation and sales promotion*: In Austel's view, the measurement of these factors is subjective and therefore it would accord this criterion a low weighting. It said, however, that strong evidence of "pioneering brand advantages" may give this criterion increased weighting and prominence; and
- *nature of corporate relationships*: In Austel's view, this criterion would be difficult to interpret objectively, and therefore it would give a low weighting to this evidence.

## C. Austel's Determinations on Dominance in the Market for Public Mobile Telecommunications Services

As the courts and the TPC have learnt over time in general trade practices cases, often the criteria are far easier to identify in theory, than to apply in practice.

*(i) Stage One*

In July 1993, Austel released its first determination on market dominance in relation to the market for public mobile telecommunications services.[266] The Mobiles Dominance Report considered whether Telstra was dominant in the market for public mobile telecommunications services.

Austel determined that Telstra was in a position to dominate the market for public mobile telecommunications services ("PMTS") and, on 14 July 1993, directed Telstra to comply with ss 183 and 197 of the Act (discussed above).

The Mobiles Dominance Report arose out of Optus' complaint to Austel that

266 Austel, *Market Dominance: Mobiles - Report on Austel's investigation whether Telstra is in a position to dominate the market for public mobile telecommunications services* (the "Mobiles Dominance Report"), AGPS (July 1993).

Telstra was in a position to dominate the market for PMTS and was in breach of :

- s 183 of the Act in that it was discriminating between persons who acquire, in that market, telecommunications services of that kind, in relation to the charges for those services or the terms and conditions on which those services were supplied; and
- s 197 of the Act in that it was demanding or receiving payment for the supply of such services otherwise than in accordance with a tariff filed with Austel under s 190 of the Act.

Apart from the question of Telstra's dominance, the other elements constituting breaches of ss 183 and 197 of the Act were treated by Austel as having been implicitly admitted by Telstra in certain correspondence.

A significant proportion of the Mobiles Dominance Report was blanked out for reasons of confidentiality (particularly information relating to market share and customer service statistics). However, there still remained a lengthy analysis of the relevant criteria identified earlier by Austel in its Market Dominance Guidelines (discussed above).

(a) Market Definition

Austel determined that the relevant market was the "Australia-wide public mobile telecommunications service provided by either analogue AMPS or digital GSM technology".

*Geographic extent of market*

Austel took the view that an Australia-wide market would be appropriate because, inter alia: customers can use the PMTS in any location covered by the service; the geographic location of use of the service does not generally determine price, service quality or customer service level; the services are marketed on a national basis; and the public mobile licences issued have Australia-wide effect.

Although, in Austel's view, the Act allows for the boundaries of a market to be outside Australia, Austel considered that it was not appropriate in this case to adopt an international market definition because neither ss 183 nor 197 of the Act made any reference to an international context and because the international roaming segment of the market was very small. According to Austel, the fact that a user could make international calls did not define the boundaries of the market. Rather, it was the ability to use the service that defined the boundary.

*Demand substitution*

Austel found that no service could be identified which was demand substitutable for PMTS. Austel considered the following services: the public switched telecommunications network; public access cordless telecommunications services; paging services; private mobile radio services; trunked private mobile radio; and mobile satellite services.

*Supply substitution*

According to Austel, because the conditions of supply of PMTS were unique in terms of factors such as the radio spectrum required or the use of cellular radio based stations, there were no existing combinations of telecommunications services which could be mixed variable with PMTS. Therefore, no existing supplier substitutes were included in the PMTS market. In Austel's view, a number of telecommunications services were complimentary services, not substitutes, to PMTS on the supply side. The possibility of further licences being issued and other carriers entering the PMTS market after June 1997, was considered too remote to be a competitive restraint on the then current market.

*Functional market*

Although Austel considered that there were two functional levels within the PMTS market (that is, wholesale and retail), it considered that there was no functional split to create two separate markets. Austel noted however, that the regulatory environment restricted the ownership and operation of an analogue AMPS network to Telstra, so that other licensed mobile carriers could only provide analogue AMPS services on the basis of resale of airtime purchased from Telstra. Telstra being the monopoly supplier of analogue AMPS wholesale airtime, it was by definition dominant at that level of the market.

(b) Determining Dominance

In making its determination that Telstra was in a position to dominate the market for PMTS, Austel analysed the following five criteria: the power to act without significant constraint; the extent of barriers to entry; the degree of market concentration and market share; the nature of corporate relationships; and product differentiation and sales promotions.

*The power to act without significant constraint*

In its earlier Market Dominance Guidelines, Austel had determined that it would give a higher weighting to evidence of a carrier's ability to determine prices independently. The following factors were identified as relevant to the determination that Telstra had the power to act without significant constraint:

- Telstra derived significant benefits from economies of scale and scope from its ownership of the analogue AMPS network, which benefits were not significantly constrained by Optus' sale of airtime on Telstra's network;
- the benefits Telstra derived from its network ownership would be maintained in the short to medium term, since the regulatory regime provided that only Telstra could own and operate an analogue AMPS network. As well, resale of analogue AMPS airtime by non-carriers was effectively precluded by the Government's mobile licensing arrangements which limited the discount on bulk airtime available to non-carriers to 5 per cent until the end of 1995;

- digital GSM, which might have provided more effective network competition, would be slow to materialise due to its significant cost for new customers and then limited geographic coverage, thus creating a barrier to customer migration from analogue AMPS to digital GSM;
- Telstra's Strategic Partnership Agreement ("SPA") tariffs, which locked in large customers, meant that a competitor had to obtain a number of small customers to obtain the equivalent number of services in operation. The cost of obtaining such customers, in terms of marketing and sales costs, was considerably higher, thus increasing the average acquisition cost per service in operation for any new market entrant (a similar argument was raised in relation to the dealership arrangements);
- the timing and extent of tariffing changes by MobileNet (Telstra's retail arm for PMTS), when contrasted with pricing behaviour in the fixed network long distance and international markets, showed that across-the-board price competition had not been a major feature of the PMTS market;
- Optus' inability, as a mere reseller of Telstra's analogue AMPS airtime, to differentiate its services on the grounds of functionality, coverage or technical quality;
- changes in Telstra's marketing and organisational behaviour were a general reaction to the introduction of competition to the Australian telecommunications market, rather than a result of particular circumstances existing in the PMTS market;
- Telstra's positive incentive to maintain customers on its analogue AMPS service and not initiate a rapid migration to digital GSM. This was because Telstra was at risk of customer loss when migrating customers to digital GSM, as the customer effectively then had a choice of three networks (that is, Telstra, Optus and Vodafone);
- the extent of Telstra's vertical integration in relation to network ownership, retail presence and distribution arrangements;
- the absence of significant constraint by the price cap and price control arrangements in relation to Telstra's pricing choices for mobile services;
- the failure of the interconnection agreement between Telstra and Optus significantly to constrain Telstra, particularly because it related to interconnection and supplementary access and not to conduct or behaviour at the retail level of the market.

Whilst the regulatory constraints upon a dominant carrier in ss 183 and 197 of the Act were relevant, they were given only a low weighting by Austel.

*Extent of barriers to entry*

In reaching its conclusion that there were significant barriers to entry which were of a magnitude sufficient not to constrain Telstra/MobileNet in the retail PMTS market, Austel noted the following structural and strategic barriers:

- the absolute regulatory barrier to the entry of a new analogue AMPS network operator until 1997. The threat of potential open competition from that date

was too distant to place any significant competitive restraint on the PMTS market;
- mobile carrier licence conditions which effectively preclude, in a commercial sense, the resale of analogue AMPS airtime by other than a licensed carrier until 31 December 1995;
- the tying of the majority of dealers to Optus or Telstra, and the tying of a majority of large dealers to MobileNet, creating a cost barrier for a new entrant based on a higher per unit cost associated with smaller dealers;
- the barrier on potential entrants reselling digital GSM due to a large proportion of the market being tied up on analogue AMPS, and the current cost to a customer of changing from analogue AMPS to digital GSM which would result in a slow migration from the former to the latter;
- Telstra's access to analogue AMPS wholesale margins which were not available to other carriers acted as a barrier to entry because it provided Telstra with a "safe" revenue base which was unaffected by analogue AMPS retail competition (Telstra had the potential to use this base to enable price discounting to be sustained at the retail level, which acted as a deterrent to new entry and a barrier to sustainable entry);
- Telstra's access to a significant history of customer based information, which could be used by Telstra to target its marketing and customer service efforts more accurately and effectively, thus raising rivals' costs;
- Telstra's ownership and operation of the analogue AMPS network which gave it control over the development and enhancement of the network as well as the timing of such developments and enhancements;
- Telstra's Strategic Partnership Agreements, which "locked in" large customers for a number of years, reducing the size of the market available to a competitor; and
- Telstra's significant advantage in the digital GSM market due to its larger, established analogue AMPS customer base which it could migrate to digital GSM. A potential new entrant faced proportionately higher costs in seeking to attract customers for its digital GSM service.

*Degree of market concentration and market share*

Austel considered that its analysis of market share information provided by the parties reinforced its conclusion that Telstra was in a position to dominate the relevant market. The major factors considered by Austel were:
- market shares held by MobileNet and Optus;
- the customer based profile;
- the rate of change in market shares; and
- the influence of customer churn.

Most of this section of Austel's report was blanked out for reasons of confidentiality. However, in the comments remaining, Austel noted that under the regulatory environment, only Telstra was permitted to build and operate an analogue AMPS network. It therefore had 100 per cent market share at the

analogue AMPS wholesale level which, in Austel's view, enabled Telstra to exert significant power at the retail level.

MobileNet held the majority share of the retail market irrespective of the measure used. Whilst Optus had enjoyed substantial growth in the number of services in operation, Austel considered that the rate of growth was not as significant when considered against the background of a rapidly increasing total market.

Customer churn, being the movement of a customer from one carrier's service to another carrier's service, was considered by Austel to be an unreliable reflection of the competitive processes in this particular market, because the market was developing from a recent monopoly.

*Nature of corporate relationships*

Austel's view was that the extent of Telstra's integration gave it significant scope to lever off other services. This was evidenced in particular by its bundling of competitive and non-contested services in Strategic Partnership Agreements. Again, Telstra's ownership of the sole source of analogue AMPS production meant that its wholesale margin was retained irrespective of how the retail market was split between the market participants. In Austel's view, the benefits flowing to Telstra from this integration contributed to its position to dominate the market for PMTS.

*Product differentiation and sales promotion*

Austel considered that the nature of product differentiation and sales promotion contributed to Telstra's being in a position to dominate the market for PMTS. This was due to a number of factors:

- because the analogue AMPS service provided by MobileNet and Optus was based upon Telstra's network, there could be no differentiation of the service at the functional level. Since this situation arose from government policy, Austel accorded a low weighting to this factor;
- as a result of Telstra's ownership of the analogue AMPS network, MobileNet had the ability to lead other resellers in the introduction of innovation and Telstra had the ability to control what service enhancements were made and the pace at which they were made. This placed Telstra at an advantage in the market because it was able to control its competitors' analogue AMPS services offerings. Again, because Telstra's monopoly in this area resulted from government policy, a low weighting was given to this factor;
- although customer service is one of the areas where MobileNet and Optus should have been able to differentiate their services, Telstra had a significant influence upon the level of customer service that MobileNet and Optus could offer (an example being Telstra's control over customer activations); and
- Telstra had a pioneering brand advantage (reinforced by the MobileNet "Chucky" series of advertisements) and supply history based on its period as a

monopoly supplier of PMTS. Austel referred to lack of supply history making Telstra's competitors vulnerable to the "Compass Airline Syndrome". Telstra also benefited from customer inertia.

*Conclusion*

As already stated, Austel concluded that Telstra was in a position to dominate the market for public mobile telecommunications services and accordingly was required:

- not to discriminate between persons who acquired public mobile telecommunications services in relation to the charges for such services or the terms or conditions on which it supplied such services; and
- to charge for such services only in accordance with tariffs filed with Austel.

Austel also stated that it recognised that the market was a dynamic one and that significant changes in the matters canvassed by it, may lead it to a different conclusion and to vary the directions given by it to Telstra. Interestingly, although Austel was of the view that such a change was unlikely to occur within the immediate future, Austel stated that it would be monitoring the PMTS market and reviewing Telstra's position in that market quarterly. The position was interesting for its apparently more proactive stance (a stance which Austel had been criticised in the past for not taking) and for the fact that the review would be undertaken quarterly, implying that significant changes might occur in the short term future.

*(ii) Stage Two*

In early August 1993, Telstra took steps to challenge Austel's findings in the Victorian Supreme Court.[267] Telstra claimed it was no longer dominant because Optus then had a mobile market share approaching 20 per cent.[268] Telstra argued that it should no longer be subjected to the obligations imposed on a dominant carrier by the Act, but should be able to compete freely with Optus (for example, through price discounting).

The direction given by Austel to Telstra also indicated that Austel would review its decision to determine whether, and under what circumstances, Austel would withdraw its direction. On 31 January 1994, Austel released preliminary findings of its review of that direction. Copies of the report were made available to various parties.[269] Upon request, Austel met with some of the parties immediately following release of its preliminary findings to provide explanation and clarification of certain issues. It also sought and received written submissions commenting upon its preliminary findings. It then conducted private meetings with Telstra, Optus, Vodafone and ATUG to review submissions and to receive further

267 At the time of writing, to the best of the writer's knowledge, that action had not been heard.

268 According to recent media reports, that figure is approximately 30 per cent at the time of writing.

269 Telstra, Optus, Vodafone, the Australian Telecommunications User Group ("ATUG"), the Cellular Dealers Association and the Department of Communications and the Arts.

comments. In addition, an industry consultation meeting attended by all parties was held on 23 February 1994.

*(iii) Stage Three*

On 2 March 1994, Austel released its final findings on its review of its earlier direction. These findings create an interesting precedent in this area.

Austel concluded that, in the absence of any constraints upon Telstra, the combination of its ownership of the AMPS network and the effect of the implementation of Government policy led, prima facie, to the conclusion that Telstra was in a position to dominate the market for public mobile telecommunications services (in this section, the "market"). However, Austel was of the view that, if it could establish sufficient safeguards, it would treat Telstra's adherence to those safeguards as having the effect of placing Telstra other than in a position to dominate the market.

Austel decided that, although AMPS and GSM may not be effective demand substitutes at present, the legislatively mandated transition from AMPS to GSM implied that the two should be treated as both demand and supply substitutes. It concluded that Telstra remained in a position to dominate the wholesale functional level of the PMTS market, by reason of Telstra's ownership of the AMPS network.

In terms of the retail functional level of the market, Austel noted that networks for the distribution of PMTS and associated equipment to customers appeared to be experiencing continued growth both in dealer numbers and activity. In terms of that part of the retail market associated with network connection and the provision of mobile-to-land or mobile-to-mobile calls, Austel noted that:

- arising from Government policy, there were, in practice, no AMPS resellers (other than Optus) of the type operating in the public switched network, thus placing limits upon the number of competitors;[270]
- from the present market positions of the two competitors, additional economies of scale which might have been achievable, did not appear significant; and
- significant levels of profitability appeared to be achievable.

For that part of the retail market relating to land to mobile calls, there was an element of complementarity with mobile users in that certain customers originate a significant share of land to mobile calls to their own mobile handsets. Furthermore, land to mobile calls were not covered by pre-selection and thus

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270 Although there is no legal restriction on the resale of AMPS airtime by persons other than licensed mobile carriers, clause 13.1 of the Telecommunications (Public Mobile Licences) Declaration (No 1) of 1991 provides that a licensee that provides services using an AMPS network must not:

- give bulk volume discounts to a person other than a nominated carrier in excess of 5 per cent for AMPS air-time; or
- enter into a contract with a person other than a nominated carrier for the purchase of bulk AMPS air-time for a period that exceeds 12 months in duration.

This has the practical effect that resale of AMPS airtime, on a commercially feasible basis, by persons other than licensed mobile carriers is effectively precluded.

remained a Telstra monopoly (such calls were also included in a range of Telstra Flexiplans).

Therefore, as a direct consequence of Government policy, the retail market had a unique structure when compared to openly competitive markets.

Austel took the view that structural safeguards would be required to ensure that Telstra could not, in the retail market, use any power flowing from its position of dominance in the wholesale market. Austel treated safeguards directed towards the behavioural aspects of dominance as being quasi-structural in effect. Austel noted that Telstra's business extended into many areas other than PMTS, and in respect of which it had either a monopoly position or a position of a substantial degree of market power. Austel considered that Telstra could achieve a position to dominate the retail market by using the power it may have had in those other markets.

In terms of the transition from AMPS to GSM, there were some factors inhibiting the transition and, as far as Austel was aware, there were no financial incentives being offered to customers by either carrier to hasten the changeover from AMPS to GSM. With the transition still in its infancy, Austel would continue to monitor closely the transition to determine whether there were any sources of market power which Telstra had arising solely from the transition and which might give rise to a need for corresponding safeguards.

Austel took the view that, until its 14 July 1993 direction was revoked, the impact of the regulatory regime together with the context of an effective duopoly, rendered an analysis of current pricing behaviour unlikely to be helpful in identifying relevant dominance. Accordingly, it concentrated on the following structural and quasi-structural conditions:

1. SPAs and Flexiplans - the proportion of Telstra's retail AMPS revenue attributable to SPAs was considered to be very small and not such as to influence Austel's findings. Furthermore, SPAs and Flexiplans were the subject of challenge in the Federal Court by Optus and the relevant sections of the Act were subject to Government consideration with a view to amending the Act. In addition, whilst Telstra appeared to have ceased promoting new SPAs, it may have been extending and enhancing existing SPAs.
2. Initial charges for interconnection - Austel noted that a heads of agreement pertaining to certain matters on AMPS interconnection was signed by the carriers in December 1993 (with some issues still to be agreed) and that land to mobile calls were not presently included in the carriers' main interconnection agreement (including pre-selection) so that such calls remained a Telstra monopoly. In respect of the main agreement, the parties were involved in negotiations to establish subsequent interconnection charges. To the extent that such negotiations impacted upon a market, Austel would monitor progress. In Austel's view, interconnection was fundamental to a competitive environment and a definitive interconnection agreement for AMPS was essential to achieving this. Accordingly, until full

agreement was reached on AMPS interconnection, Austel's view was that Telstra must be viewed as being in a position to dominate the retail market.

Although it considered information both as to pricing and market share, that information was such as not to enable Austel to draw any conclusions as to the extent of Telstra's market power in the retail market (although, those limitations would be significantly reduced in the event that Austel was to revoke its direction to Telstra). Austel concluded that the relationships between Telstra and its dealers did not create a cost barrier to Telstra's competitors, however, it would continue to monitor the situation in consultation with the Trade Practices Commission, as appropriate.

Arising from its review, Austel developed proposed safeguards in respect of four areas:

- interconnection;
- accounting separation;
- AMPS network development; and
- customer service and customer information.

The purpose of these safeguards was to ensure that any discretionary power derived by Telstra from ownership of the AMPS network, and which might have placed Telstra in a position to dominate the retail market, was constrained such that Austel could be satisfied that Telstra was no longer in such a position. Should Telstra satisfy Austel on all of the conditions of these safeguards, then Austel would revoke its direction. The attachments to the report detail a number of specific actions which would need to be taken by Telstra, and information and evidence which would need to be provided to Austel. It is beyond present scope to summarise these.

In addition, Austel proposed to develop a compliance manual containing the safeguards and all other relevant requirements. The process of manual development would be subject to industry consultation. Compliance with the terms and conditions of the manual would be a matter between Telstra and Austel. Specifically, Austel concluded that the best means of achieving Telstra's continuing compliance with the manual would be by a direction requiring Telstra to continue to comply with the terms and conditions of the manual.

Austel's view was that, should it lift its 14 July 1993 direction, then an effective regime of safeguards would be preferable to any consideration of reimposing the 14 July 1993 direction. Therefore, Austel would monitor Telstra's compliance with the manual, market behaviour and the transition from AMPS to GSM. Austel's expectation was that the safeguards it had designed would be sufficient and that some of them could be expected to be eased with successful AMPS to GSM transition (subject to industry consultation).

If Austel formed the view that any of the safeguards needed strengthening, it would seek to negotiate such changes with Telstra and, if unsuccessful, would consider using its powers under the Act. However, only after an Austel investigation, which demonstrated a source of Telstra market power, use or threat of use of that power by Telstra, and a convincing case for additional safeguards,

would Austel seek to amend the compliance manual by strengthening the safeguards. Other circumstances in which the manual would be amended included legislative change, Ministerial direction, judicial decision or the outcome of an action under the *Trade Practices Act*.

Accordingly, unless and until all of the conditions contained in the compliance manual were met by Telstra, Austel would be satisfied that Telstra remained in a position to dominate the retail market. Austel's direction of 14 July 1993 would therefore remain in place, until Telstra did comply with the manual, at which time Austel would revoke its 14 July 1993 direction and replace it with a direction to comply with the manual as amended from time to time.

*(iv) Comment on Austel's Final Mobile Findings*

The findings are interesting when considered from the perspective of previous criticism of Austel that it invariably adopted reactive, rather than proactive, stances in relation to issues affecting the telecommunications industry. This report is clearly an effort on Austel's part to take a more proactive role and to seek to develop solutions which promote competition in the industry, rather than merely pronouncing upon an external situation.

The safeguards are quite numerous and extensive, but the extent to which they overestimate or underestimate the factors which lead to, or sustain, dominance in a relevant market, remains to be seen.

*(v) Comment*

There is now a considerable quantity of material available on the question of markets and dominance in telecommunications in Australia. Undoubtedly, there will continue to be room for disagreement at the level of specifics. For the players, customers and market commentators, the future of Australian telecommunications looks set to be highly charged as the issue of "dominance in a market" truly comes to the fore.

## VI. EFFECT OF THE COMPETITION REFORMS

This article has described at length certain network competition reforms which have been put into place in the telecommunications industry. The obvious question is, what effect, to date, have those network competition reforms had?

There have been some quite significant effects in the market as a result of both the competition reforms considered in this article and those which were beyond present scope. However, publicly available comparative information concerning, for example, the pricing of telecommunications services (the primary factor by which consumers measure the effects of competition reforms), is very limited.

The major public source for such information is the report provided by Austel to the Minister pursuant to its obligation under s 399 of the Act. At the time of

writing, the latest report available was for the 1992-93 financial year.[271] Notwithstanding the note of caution which may be sounded about relying upon such relatively dated information to draw conclusions about the present state of competition reforms in the telecommunications market, it is to be expected that the competition reforms will continue to deliver increased benefits to consumers of telecommunications services.

## A. Competition Benefits Generally

In November 1992, Optus began competing, in limited geographic areas, in the international and domestic long distance call markets. The entry of Optus into the telecommunications market and changes implemented by Telstra saw a rapid growth in the range of services and pricing options available. The more significant price reductions in 1992-93 were in those areas where Optus had entered the market and provided competition to Telstra (the competitive impact having been particularly strong in the international calls market).

The main areas of competition in the 1992-93 year generally were mobile services, international calls and national long distance calls. For Telstra, these products accounted for approximately half of its telecommunications revenues, but generated nearly all of its profits.[272] The other major impact of competition was Telstra's programmed reduction in overheads and other expenses.[273]

The strategies of the carriers differed however. Optus tended to offer lower across the board price reductions and also introduced discounts based on total usage levels for all customers.[274] Telstra offered larger reductions via Flexiplans or other pricing initiatives aimed at particular customer segments. That is, Telstra offered its discounts in a targeted manner compared with Optus' strategy which was directed at offering lower prices to all consumers in order to build market share and establish its market presence.[275] However, off-peak rates formed a clear bias in both carriers' strategies for the purposes of offering reductions, testing the market and undertaking promotional activities.[276]

The different pricing behaviours of the carriers make it difficult to illustrate precisely actual and percentage changes in call costs and how consumers have benefited from price reductions. In any event, the effect of competition reforms cannot be assessed in purely monetary terms. Arithmetical price analyses fail to

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271 Note 140 *supra*.

272 *Ibid*, p 103.

273 *Ibid*.

274 One exception to this has been the introduction in July 1993 by Telstra of the progressive discount structure which applies a reduced per minute call charge as the duration of an individual international call increases: *ibid*, p 96.

275 *Ibid*, p 100.

276 This has been observed in the following areas:

- reductions in the actual rates;
- extensions in the times at which they are available;
- extensions in the countries to which they apply; and
- simplification of the structure: *ibid*, p 98.

take into account such matters as improvements in the levels of customer service, increased product innovation and choice, lower handset prices, increased network coverage, generally improved billing information and other "quality" improvements which occurred over the 1992-93 year, as a result of which most consumers received at least some non-price benefits.[277]

## B. The Price Cap Arrangements

The price cap arrangements have been instrumental in delivering lower prices in real terms for the main consumer-sensitive services, including services supplied in competition with another carrier and those for which there is limited effective competition.[278] The price cap arrangements provide Telstra with some flexibility to structure its pricing regime as to the areas where it effects price variations to meet its price gap obligations. This flexibility resulted in the benefits of Telstra's price reductions not being uniformly distributed across services and market groups. Rather, and perhaps unsurprisingly, its larger price reductions were targeted towards the areas of greatest competition.[279]

In actual terms, Telstra reduced its revenue-weighted prices for the basket of price-capped services by 3.56 per cent in 1992-93.[280] This corresponded with a revenue benefit to consumers generally of nearly $300 million.[281] This reduction in Telstra's average revenue-weighted prices included significant reductions in the prices for domestic and international long distance calls and mobile services - the price reductions calculated for price cap purposes indicate that international prices fell by almost 11 per cent, domestic long distance calls fell by 4 per cent and mobile prices fell by an average of almost 9 per cent.[282]

In order to satisfy its price cap obligations in 1992-93,[283] Telstra relied heavily on price reductions on international call streams. Standard charges for access and local calls were not varied at all, partly, at least, as a result of the limited scope for

277 *Ibid*, pp 92 and 100.

278 *Ibid*, pp 85 and 99.

279 Such as certain trunk and international streams, and certain customer groups (such as high-use residential and business customers) through Flexiplans and Strategic Partnership Agreements (for example, under the latter, the discounts available varied between 11 per cent and almost 13 per cent depending upon volume): *ibid*, pp 86 and 99.

280 Under the AOTC Carrier Charges Price Control Determination 1992, the 0.04 per cent shortfall of its 3.6 per cent requirement will carry over to Telstra's obligations in 1993-94. The 3.6 per cent requirement arises from the price cap arrangements which restrict the overall or average revenue-weighted price movement for a basket of services to a limit defined by the Consumer Price Index less 5.5 per cent. In 1992-93, the relevant CPI figure was 1.9 per cent (the price cap arrangements utilise the previous period's CPI figure). Accordingly, the price cap formula was (1.9 per cent-5.5 per cent), that is, -3.6 per cent.

281 However, consideration of these results in terms of benefits to individual customers needs to be qualified as the price cap figures are a revenue-weighted average of the price variations and also include the impact of Telstra's Flexiplans, SPAs, special promotions and targeted concessions but do not include the impact of Optus' price movements: note 140 *supra*, pp 87 and 89.

282 *Ibid*, p 99.

283 *Ibid*, p 88.

increase provided by the CPI minus 2 per cent price cap.[284] Therefore, achievement of the sub-cap applying to access (connection and annual rental charges) and local calls was mainly through the introduction of targeted pensioner concessions applying to connections and local calls and, to some extent, through the provision of discounts on local calls through Flexiplans. Leased line charges also decreased overall by almost 2 per cent.[285]

## C. Call Pricing

Traditionally, Telstra has varied its charges for calls according to variables such as distance, time and, in the case of international calls, the settlement rate negotiated with the carriers in the relevant countries (discussed further below).[286] However, in May 1993, in response to Optus' charging structure based, in part, on a series of special discounted routes, Telstra introduced, for the first time, its own inter-capital city rates, as well as reductions to the more popular overseas destinations.[287]

Another significant development was the introduction by Telstra, in newer exchanges, of software-driven billing systems which allowed call costs to be determined on a per second basis, thus reducing long distance and international call charges generally.[288] Optus has billed its long distance services on a per-second basis from the time of commencement of services.[289]

### *(i) Domestic Long Distance Call Charges*

Apart from Telstra's introduction of the inter-capital rate and the reduction in its Q distance band[290] rate, the only movement in Telstra's standard STD prices stemmed from the average reduction of 0.5 cents per call attributable to the introduction of per second charging (as discussed above).[291] Optus, by comparison, made some very significant reductions in the period.

Compared with the standard prices available at the beginning of 1992-93 for a 5-minute Melbourne to Sydney peak trunk call, the standard prices available at the end of the period were approximately 18.5 per cent lower from Optus and at least 8.5 per cent lower from Telstra (larger reductions were available if Telstra's

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284 It is important also to bear in mind when comparing international call services to local services, that the cost structure for the former differs from that for a large proportion of the latter, because the former is characterised by variable, rather than fixed, costs. Domestic telecommunications are relatively insensitive to the level of usage because the installed CAN constitutes, practically, a sunk cost. By contrast, many international telecommunications costs are specifically usage-related (for example, payments to Intelsat and Inmarsat for satellite services and for terminating services at the foreign end): note 185 *supra*, p 49.

285 This category covers a large number of individual prices associated with a range of Telstra's services that fall within this definition: note 140 *supra*, p 88.

286 *Ibid*, p 94.

287 *Ibid*.

288 *Ibid*, p 93.

289 *Ibid*.

290 The Q distance charging band is 165-745 kms.

291 Note 140 *supra* p 95.

Flexiplans were taken into account).[292] For a 5-minute peak international call to New Zealand, the standard prices applying at the end of the period were some 12 per cent lower from Telstra and in excess of 18.5 per cent lower from Optus.[293]

*(ii) International Call Charges*

In 1992-93, there were price reductions on all major international call streams, as well as structural changes which made off-peak rates available to most international calling destinations.[294] The most significant reductions occurred on special routes, however Optus made some not insignificant reductions in its charges applying to standard routes.[295] Some reductions were a direct result of variations to meet price cap obligations, but there were also additional reductions by Telstra in response to Optus' pricing strategies.[296] Other reductions were due to both carriers renegotiating more favourable settlement rates.[297]

Increased use of short-term and promotional discounts featured in the marketing of international services. Hourly, weekend and other short-term discounts were used by both carriers to increase public awareness of the carriers' pricing initiatives and strategies and to stimulate demand.[298]

The BTCE has found that there has generally been a decreasing price history for major telecommunications services.[299] International direct dialling prices fell by 70 per cent in real terms between 1979-80 and 1991-92. Optus has predicted that prices for international direct dialling and data services will decline by 40 per cent over the first five years of competition, and by 60 per cent over the first ten years.[300]

By way of international comparison,[301] certain studies have indicated that Australia has the second cheapest collection charges for business and residential calls.[302] One study, which used nominal international call rates as its basis for comparison, ranked Australia ninth out of eleven major industrialised countries for international call charges.[303] However, another study by the Organisation for Economic Co-operation and Development ("OECD") found that Australia had become relatively more expensive than the majority of OECD countries.[304] The OECD study used a mix of peak and off-peak calls for two baskets (business

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292 *Ibid*, p 100.
293 *Ibid*.
294 *Ibid*, p 96.
295 *Ibid*.
296 *Ibid*. It is interesting to note, by way of background, that Telstra's international prices fell by 25 per cent in real terms between July 1989 and June 1992: note 185 *supra*, p xv.
297 Note 140 *supra*, p 96.
298 *Ibid*.
299 Note 185 *supra*, p 34.
300 *Ibid*.
301 The validity of such a comparison is affected by a range of factors such as the measurement approaches used and the different taxation regimes applying in countries being compared.
302 Note 185 *supra*, p 32.
303 *Ibid*.
304 *Ibid*.

excluding tax and residential including tax) for the period from November 1985 to July 1992.[305]

*(iii) Mobile Call Charges*

In terms of the mobile services market, in which Optus began competing in June 1992, the total market size grew in 1992-93 by approximately 50 per cent to in excess of 650,000 users.[306] Although Optus secured in excess of 15 per cent of the mobiles market, Telstra's mobile services revenue nonetheless increased during that year.[307]

A reduction of almost 9 per cent[308] in mobile call charges occurred during 1992-93, making an important contribution to Telstra's fulfilment of its price cap obligations.[309] The larger price reductions were secured by large and corporate users of mobile services (above 270 minutes a month). Yet the data available to Austel indicated that the majority of Telstra's customers used less than 270 minutes of air time per month.[310] Thus, the reduction in charges was not uniform across customer profiles.

## D. Other Matters

*(i) Service Providers*

It is apparent that there has been an increase in service provider competition in the domestic and international resale markets (other than in the market for public access cordless telephone services, in respect of which, at the date of the Competition Report, Telstra remained the only supplier).

In terms of eligible services, detailed information as to the competitive effect of the increased reseller activity is difficult to obtain because providers of eligible services are not required to enrol. However, Austel views the significant number of requests for information on the SPCL as indicative of competition in that market.[311] In terms of eligible international services, there are a number of persons

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305 *Ibid.*

306 Note 140 *supra*, p 103.

307 *Ibid.*

308 The methodology used to calculate this figure may not accurately reflect the price reductions experienced by all relevant consumers. For example, because the calculation method determines the price change associated with Flexiplans by comparing them to the prices applicable under the "standard" plan, the methodology reasonably reflects price changes consequent upon the introduction of a particular Flexiplan, but does not reflect price changes accruing to subscribers whose plans are unchanged throughout a particular year. Although in such a case there has been no actual price change, the price cap methodology provides a price reduction credit. In addition, the inclusion of Flexiplans and SPAs in the price control arrangements may exclude smaller users who make few long distance calls or users who, for whatever reason, find Flexiplans unattractive, from the benefits of those arrangements. The writer understands that Austel is reviewing the quantitative methodologies used: *ibid*, pp 92 and 100.

309 Mobile charges are not subject to any specific sub-cap requirements. Rather, mobile services price changes are incorporated into the overall price cap limit: *Ibid*, p 89.

310 *Ibid*, p 92.

311 *Ibid*, p 67.

enrolled as suppliers of eligible international services.[312] However, as not all providers of eligible international services are required to enrol, enrolment is not an entirely accurate means of assessing competition in the international resale market.

Austel is presently conducting a market survey of service providers which will be detailed in its next s 399 report.[313] A formal survey such as this is to be welcomed.

*(ii) General*

A survey conducted by Austel found that the 500-metre rule authorisations[314] have resulted in significant cost savings and contributed to increased timeliness and flexibility in the installation of line links. The survey found per annum savings of between $650-$200,000 on installation costs and of between $500-$150,000 on maintenance costs. Of those who experienced savings on maintenance, approximately 50 per cent achieved savings of greater than $5,000 per annum.[315]

Number allocations made during 1993 for geographic and special service codes also contributed significantly to the development of competition in the industry.[316]

## E. Further Competitive Reform Issues

*(i) Number Portability*

The industry and, in particular, the Australian Telecommunications Users Group, consider number portability between carriers and service providers an important issue in relation to competition. By allowing customers to change carriers without undergoing a change to their number, number portability enables carriers and service providers to compete on a more equitable basis.

However, the potential for number portability is contingent upon the degree of compatibility between the technical standards as well as the actual services involved. AMPS mobile customers are currently able to retain their numbers when changing between Optus and Telstra, however, as Austel is committed to inter-

312 At the time of writing, MIG International Communications, BT Australasia Pty Ltd, SingCom (Australia) Pty Ltd, Easycall Australia Pty Ltd, Pacific Nexus Pty Ltd, Teknix Communications (Australia and Overseas) Ltd, Fugro Survey Pty Ltd, ABA Telecommunications Pty Ltd, Telecell Pty Ltd, Stanilite Electronics, International Telemanagement Corporation, PacRim Financial Network Pty Ltd, AAP Telecommunications Pty Ltd, Newsnet Pty Ltd, Saturn Global Network and Equal Access Communications Pty Ltd.

313 Note 140 *supra*, p 35.

314 Under clause 4 of the Telecommunications (Authorised Facilities) Direction (No 1) of 1991, Austel must authorise a person, under s 108(a) of the Act, to install, maintain or use a line link that connects two distinct places if that person is the principal user of those distinct places and the distinct places are not more than 500 metres apart.

315 Note 140 *supra*, pp 56 and 58.

316 The most pro-competitive number allocations made during the year include the 14XX range for service provider access and preselection over-ride services; the 041 number range for the provision of digital mobile services (GSM); the 180 number range for freephone services; the 190 number range for recorded and live information services; and the 015 number range to supplement the shortage of 018 numbers for existing analogue mobile cellular services (AMPS): *ibid*, p 76.

carrier/service provider number portability, it is giving further consideration to technical and economic feasibility issues.[317]

*(ii) Accounting Rate Agreements*

In addition to revenue derived from collection charges levied against consumers, telecommunications carriers also derive revenue from other carriers in the form of accounting rates. Accounting rate agreements determine the financial settlement between carriers for network use if traffic is greater in one direction than another. The BTCE has described it more particularly thus:

> The accounting rate framework covers the cost of a call over the telecommunications network of another international carrier, with the originating carrier paying the delivering carrier for carriage of the call from the mid-point of the particular stream to the destination.
>
> The accounting rate regime provides for a basis on which differences in the amount of traffic carried by each carrier can be recompensed. By way of illustration, if 10 million minutes of traffic are sent from country A to country B and 20 million minutes are sent from country B to country A, the country A carrier has delivered an additional 10 million minutes of traffic over its network. If the accounting rate is set at, say, 2 SDRs[318] per minute, and the accounting rate is divided on a 50:50 basis (that is, the settlement rate), the country B carrier will be required to pay a settlement to the country A carrier of 10 million SDRs, which represents a payment for the extra use of services supplied by the country A carrier.[319]

In the past, at least, the accounting rate system benefited the carriers at both ends of an international call by encouraging cooperative sharing of infrastructure and service provision. However, the system has long been criticised for its high accounting rates[320] and the fact that the pricing often bears little relationship to the cost of service provision.[321] It has also been said that the present settlement system represents an impediment to the attainment of economic efficiency, for the following reasons:

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317 *Ibid*, p 83. At the time of writing, Austel had produced a discussion paper on issues concerning the technical feasibility of number portability. It is presently considering number portability as a general issue, in particular, the benefits to consumers which might accrue from the introduction of number portability in specific services such as GSM mobile and 1-800 free call services. Austel has stated that it is committed to a service by service approach to the introduction of number portability.

318 The rates are often specified in terms of SDRs, an International Monetary Fund (IMF) unit made up of a basket of major currencies, or in United States dollars per paid minute of traffic. SDR is calculated by the IMF on the basis of a 'weighted basket' of five currencies (the United States dollar, German mark, French franc, Japanese yen and British pound): note 185 *supra*, p 61.

319 *Ibid*, pp 60-1.

320 Australia, as a country with an overall traffic deficit, has been a strong advocate of lower accounting rates: Dr S Paltridge, "Globalisation - Is the Medium the Munition?" (Aug 1993) *Australian Communications* 95 at 103. Australia has been renegotiating some accounting rates (for example, in March 1991, OTC announced that Australia and Singapore had renegotiated a lowering of their accounting rate by 24.5 per cent, with further reductions expected over the subsequent 3 years): *ibid*, p 73.

321 For example, the cost of providing infrastructure is greater in developing countries, yet the rate existing between developed countries is often higher than those of developing countries: Paltridge, *ibid* at 100.

- the system is not cost-oriented (for example, the accounting rate is generally not structured to promote efficient use of network resources - for example, by differentiating by time (peak and off-peak) and volume pricing);
- inefficiencies in the common practice of dividing the accounting rate on a 50:50 basis[322] - for example, such a division does not reflect the fact that the cost of sending outward calls exceeds the cost of terminating inbound calls;
- accounting rates appear to be discriminatory between countries; and
- the system may support inflexible pricing, as carriers who are net "importers" of call traffic often appear reluctant to reduce accounting rates (traffic imbalances combined with high accounting rates give rise to economic rents, thus providing a positive incentive to maintain high accounting rates as the benefit from the resulting settlement payments may be used for other purposes such as cross-subsidising telecommunications development).[323]

In recent times, there has been significant pressure for reform of the international settlement arrangements, both from governments and through market developments consequent upon liberalisation policies in this area. At the international level, reform of the accounting rate system has been pursued. For example, in mid-1991, the Commission of the European Community announced an enquiry into international calling charges and competition.[324] The United States has sought an investigation by the International Telecommunications Union ("ITU") into the accounting rate system.[325] Furthermore, the United States, which alone publishes its accounting rates, has urged the collection and publishing of current accounting rates among ITU members.[326]

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322 This practice is based on CCITT Recommendation D.150 (discussed below).

323 Note 185 *supra*, pp 67-8.

324 *Ibid*, p 68.

325 The ITU lays down rules governing international charging and settlement procedures, and has three main components:

- regulations set by the 1982 Nairobi Convention;
- administrative regulations set by the 1988 World Telegraph and Telecommunications Conference in Melbourne; and
- recommendations developed through working groups of the International Telegraph and Telephone Consultative Committee ("CCITT") (unlike the regulations, these recommendations are non-binding).

Article VI of the International Telecommunications Regulations requires member ITU administrations to take into account relevant cost trends and Article I suggests that the lowest possible rate should be pursued.

The CCITT guide to general tariff principles (CCITT 1989) sets out charging and accounting rate procedures for international telecommunications services. The basic principle of the CCITT recommendations, contained in CCITT Recommendation D.150, is an equal division of accounting revenue, in principle on a 50:50 basis:

> Under this procedure, the accounting revenue from the traffic exchanged in their relationship is divided between the Administrations of the terminal countries, in principle on a 50/50 basis. Proportions other than 50/50 may be used when the facilities made available by each of the Administrations of the terminal countries are not approximately equivalent, or if Administrations reach agreement on a different proportion when, for example, the costs differ greatly.

Separate international agreements between individual countries specify the revenue to be shared by the carrier that originates a call with the other carrier that completes the call link: *ibid*, pp 61 and 75.

326 Such publication assists in making the system more transparent and open to public scrutiny: *ibid*, pp 69 and 72.

In addition, the liberalisation of international resale markets, as has occurred in Australia under the Act, is anticipated to create further pressure for the reduction of both collection charges and accounting rates.[327] Price reductions will also inevitably occur as technological improvements, competition and improved organisational efficiencies continue to affect the international telecommunications market.[328]

The introduction of competition in Australia has undoubtedly seen the decline of effective prices in the international market. However, the scope for continued decline will depend, at least in part, on structural reform of the international settlement arrangements and, particularly, reform of the accounting rate framework. It has been suggested however, that substantive reform through the ITU forum may be problematical, in light of member administrations' diverse interests and the economic benefits which accrue from the present accounting rate system to a number of ITU members.[329]

An interesting feature of the Australian regulatory regime worth noting is that, under clause 5 of the Telecommunications (International Code of Practice) Direction (No 1) of 1992 and clause 7 of the Telecommunications International Code of Practice,[330] where Austel finds that dealings between a carrier and an international telecommunications operator will have the effect of allowing the operator to misuse, or continue to misuse, its market power,[331] Austel has the power to direct the carrier to, inter alia, make an agreement with an operator on a specific accounting rate and to otherwise direct the carrier in its dealings with international operators.

## VII. CONCLUSION

There is clearly much scope for the Act to be simplified in terms of language, structure and concepts. The regulatory regime is highly complex and often involves very difficult questions of interpretation (some such questions having already resulted in fundamental conflicts of opinion and necessitating further legislative intervention).

Notwithstanding, in the 1992-93 period, the network competition reforms introduced by the Act clearly delivered both tangible and intangible benefits to consumers of telecommunications services in Australia. Relatively significant price reductions for a number of telecommunications services have occurred. In

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327 For example, the use of dedicated leased lines to transmit international telephone traffic may potentially by-pass the international accounting rate system. In order to compete with such services, carriers may need to reduce collection charges. Such reductions will be impaired by the operation of the accounting rate. Hence, reduction of the international accounting rate represents one means to achieve this outcome: *ibid*, p 69.

328 *Ibid*, p 2.

329 *Ibid*, p 72.

330 Promulgated under s 77(1) of the Act. Carriers are obliged, under s 78 of the Act, to comply with the Code.

331 The term "misuse of market power" is defined in clause 4 of the Telecommunications International Code of Practice.

addition, a number of non-price benefits (such as improvements in service quality) have occurred. Although there has only been a relatively short history of competitive behaviour, the indications are that such benefits will continue to accrue. Of course there are many other areas, particularly internationally, which provide continued scope for increased competition in Australia (such as hubbing[332] and global managed network services[333]). Furthermore, reforms in areas such as the accounting rate agreements will also play a significant role in lowering international telecommunications costs for Australian consumers.

Although much has been achieved in a relatively short space of time, there are still a number of important areas in which experience to date has shown that criticisms of the current regime are warranted. Arguably, the most important of these areas is the question of delivery of the benefits of network competition reforms to *all* Australians.

As has been seen, price benefits in real terms were, to some extent, differentially shared between different segments of the market (the level of benefit in any particular case being heavily dependent upon calling patterns and service usage). Austel states in its Competition Report that "this is an expected outcome of the competitive process which tends to force prices closer towards the underlying costs".[334] However, such variances nonetheless raise conspicuous questions of equity.

Furthermore, the network competition reforms have failed to address the fact that a not insignificant number of Australians still cannot afford to subscribe to any telephone service, notwithstanding the universal service obligation, because of the (relatively) high costs of telephone bonds, rentals and local call charges. It will be interesting to observe the impact of the competition reforms for such would-be consumers when Optus rolls out its own local loop network as it has indicated it will do. However, it is arguably more appropriate to address these issues specifically (as the universal service obligation attempts to do) since overseas experience suggests that equitable distribution of competition reform benefits will not occur through the competitive process alone. In view of the importance of communications technology in securing access to services, information and even the democratic process generally, these issues cannot continue to be ignored or relegated to linguistically ambiguous and arguably trite obligations.

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332 In the words of the BTCE, "a telecommunications hub is taken to be a telecommunications centre, controlling all connected telecommunications traffic in a geographic area, with connections to other sites within the network. Accordingly, the hub seeks to balance telecommunications traffic between centres. It also provides transit services for telecommunications spokes connecting to other hubs": note 185 *supra*, p 26. According to the BTCE, Telstra's hubbing customers include American Express, Mastercard, IBM, Sheraton Hotels, Time Life International and SWIFT (p 28).

333 These are integrated packages of managed network services to major corporate clients. Examples are "one-stop-shop agreements, which exist between a number of international carriers, which provide a single point for ordering, billing and fault reporting for customers and a means for international carriers to offer, as far as the customer is concerned, a complete international private line circuit ....": *ibid*, p 29.

334 Note 140 *supra*, p 100.

The processes for further debate about network competition and other telecommunications reforms, leading to the post 30 June 1997 regulatory environment, are clearly crucial. It must be ensured that the future regulatory model fulfils, as far as possible, a number of (potentially conflicting) goals - business efficiency, certainty, equity, flexibility and simplicity. There is still much to achieve in terms of providing widespread and affordable access to this vital communications medium of the modern information age. There are probably some (primarily business consumers) who would be willing for Australia to stand up on the winner's podium. But we are not quite ready to put the winner's laurel around our necks just yet.